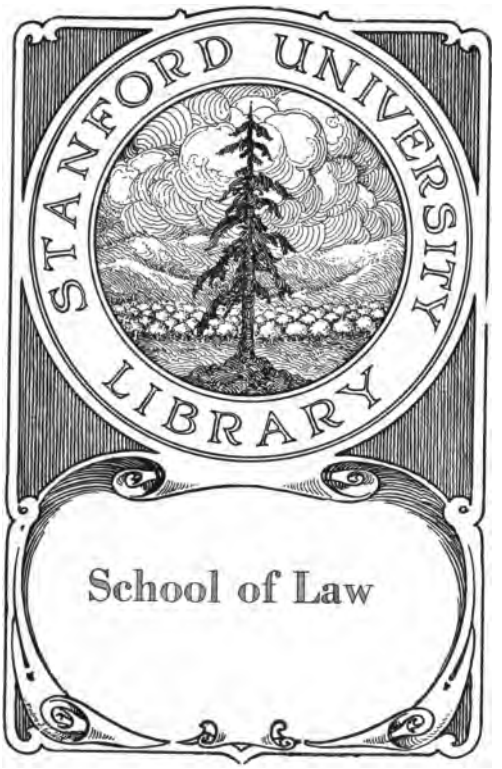

THE

LOWER CANADA

2369

Law Journal.

VOL. I.

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The Lower Canada Law Journal.

Salus Populi Suprema Lex.

JULY 1865.

PROEM.

'The first number of a new publication is never so good as its successors, and consequently not a fair specimen,' said an English reviewer, noticing the first issue of a new work. There being several reasons why the first number of the LAW JOURNAL is hardly an adequate representative number, we have thought proper in laying this issue before our readers, to say a few words in explanation of the design and objects of the work. *In limine*, let us say, a glance at the contents of this number will serve to dispel a misconception, which, we understand, existed in the minds of a few, outside of the profession, who probably had not seen our prospectus,—that the JOURNAL was likely to come into competition, or interfere in the slightest degree, with the Lower Canada Jurist, which for so many years has enjoyed the high and well-deserved esteem of the profession. So far is this from being the case that the learned editors of the Jurist have been among the earliest and warmest supporters of this publication.

In the first place, then, we trust to see the LAW JOURNAL become a medium in the pages of which members of the bar and others can communicate their opinions, and advocate such improvements and amendments in the law as they may desire to see carried out. It is unnecessary to say that no personal reflections, or remarks passing the bounds of fair criticism, will find a place in these columns. Though the JOURNAL is not designed for a Reporter, we propose to publish condensed reports of the proceedings and decisions of our courts, paying particular attention to the courts of Review and Appeal. Interesting points arising in the course of criminal trials, and all important criminal cases, so far as they can be procured, will be noted and commented upon. New books issuing from the Provincial and British Press, will be reviewed and criticised. Correspondence, legal appointments, calls to the bar, and compilations, will also find a place. The remainder of each number will be devoted to interesting matter selected from English and American periodicals.

As to the form of the JOURNAL, it was not without some hesitation that a quarterly issue was decided upon. But reflection has served to convince us that while some ends would have been more efficiently served by a weekly or monthly publication, the form we have adopted is better calculated to ensure success, being more adapted to this our day of small things. We propose, however, to issue the publication monthly as soon as circumstances will warrant the change.

Having said so much by way of explanation, it only remains to record our gratitude to those who have aided our humble efforts. *Bis dat qui cito dat* is especially applicable to encouragement of a literary undertaking, and to those who came forward with expressions of good will and promises of assistance at the first announcement of this Journal, a double acknowledgment is due. Begun with no little diffidence, the labors of the editor have proceeded with growing confidence. *Heureux commencement est la moitié de l'œuvre*, and our beginning has equalled the most sanguine expectations, and given a fair promise of continued vitality and progress.

COMMISSION TO THE BAR OF LOWER CANADA..

The law now in force regulating commissions to the bar of Lower Canada is to be found in section 27, chap. 72, of the C. Statutes of Lower Canada, and is drawn from the 12 Vic., c. 46, s. 27 ; 16 Vic., c. 130, s. 6, and 22 Vic., c. 104. As it now stands, the law constitutes three classes of persons who may be admitted to the bar of Lower Canada* :—

1. Five years clerks; i. e., any one who has studied regularly and without interruption, under a notarial agreement, as a clerk or student, with a practising advocate, during five consecutive and whole years.

2. Four years clerks; i. e., those who, previous to their clerkships, have gone through a regular and complete course of study in any incorporated college or seminary.

3. Three years clerks, who are of two sorts: a. Any one who has gone through a regular and complete course of study in any incorporated college or seminary, and also through a complete course of law in any incorporated college or seminary;—b. Any one who has followed a regular and complete course of law in any incorporated university or college in which a Law Faculty is established, as provided by the statutes or regulations of said university or college, and has taken a degree in law there, and such course of study may be followed simultaneously with his clerkship under articles.

These regulations are intended to be very stringent, but practically they are almost useless, and this for two reasons. First, the examinations as to capability are left to the examiners of each section of the bar ; and second, what constitutes a regular and complete course of study, or a regular and complete course of law, is not defined. Now the results are what might fairly be expected. The bar examinations are a sham, and the tendency of competition between the different colleges, seminaries and universities, each of which has the unfettered power to fix its own course of study, is to lower more and more the standard of learning necessary for admission to the bar. If the bar examinations were something more than a form, colleges and universities would be obliged to keep their course up to the mark, to avoid the disgrace of seeing their students plucked; but I contend that no more professional examination, and more especially an oral one, will ever continue for any length of time to be serious, or that it offers any guarantee of capacity whatever. This is so well known that admission to the bar in France, so far as the action of the bar is concerned, is simply an enquiry into the respectability of the candidate, of his having decent chambers for consultation, and something of a library; and the bar of Paris is a model admirably suited for our imitation.

With a view of improving our system here, Mr. Irvine, member for Megantic, introduced a bill, during last session of Parliament, containing the following amendment:—

Section 27, c. 72, C. S. L. C., is hereby repealed, and the following substituted therefor:—27. No person shall be admitted as an advocate, barrister, attorney, solicitor, and proctor at law, unless he has attained the full age of 21 years, and has studied regularly and without interruption, under a notarial agreement as a clerk or student with a practising advocate during four consecutive and whole years, and has gone through a regular and complete course of study in an incorporated college or seminary, or is admitted under chap. 75 of the C. S. of Canada.

2. Except that if any candidate for admission to the bar has followed a regular and complete course of law in any incorporated university in Lower Canada in which a law faculty is established, as provided by the statutes or regulations of the said university, and has taken a degree in law in such university, he shall be admitted as a member of the bar on presentation of his diploma to the council of any section of the bar; Provided, That the said course of study extend over three years at least, and comprise not less than 150 lessons a year, and include instruction in Roman law—the civil code of L. C., criminal law and procedure. But the bar shall not be obliged to admit any one whose moral character is bad.

The effect of this amendment would be to introduce two classes: 1. The university man who, having taken his degree in law, would pass in three years.

* Of course without counting barristers of Upper Canada, who may be admitted under cap. 75, C. S. C.

He could not be excluded by the bar, except for character; but again the university would be obliged to give the amount of instruction fixed by law as the *minimum*. 2. The student who had gone through a regular and complete course in any incorporated college or seminary. He would pass with four years' clerkship, on two examinations, as at present, with this difference, that he would be under the necessity of bringing his certificates from the incorporated college or seminary before being admitted to study. The expression used in section 26, "a liberal education," would therefore come to mean the education of our incorporated colleges or seminaries, that is, of the public schools of superior education.

This amendment would not, perhaps, give all the guarantee desirable; but it would be at all events a step in the right direction, and would prepare the way for that separation of the attorney and advocate practice, the necessity of which is becoming more and more felt daily.

R.

LAW REFORM SOCIETY.

An effort is being made with the concurrence of some of the first practitioners to found a society having for its object the suggestion of needed reforms in the law.

Such a society is greatly needed. That there should be a body which will discuss projected legislation "*avec connaissance de cause*" cannot be denied. In England such a society exists, and its influence is extensive and beneficial. In Upper Canada, we believe, such a society is organized, and works well.

Merchants have their Board of Trade, where questions of moment affecting the commerce of the country are discussed, and reforms suggested. Why should not the same interest be shown amongst lawyers? Bacon tells us that "every man owes a debt to his profession."—How many of us are paying the debt which we owe to the noble profession of the law?

Can we effect any good by withholding our active sympathy and practical cooperation with sincere efforts to elevate the profession? Many of our old lawyers shrug their shoulders and scout the idea of success to any effort of this kind. At the same time these gentlemen are loud in their praise of the *olden times* when there were giants in the profession. We question if any giants in the profession were ever made by vain regrets for a former state of things. We must do the best with the present material, which we believe to be as good as any which formerly existed. Energy and perseverance will rescue us from the slough of despond into which we have apparently fallen.

A Reform Society will be the initiatory step. By bringing the members of the bar into closer relations, the Society would gradually evolve an *Esprit de Corps*, which at present seems to be in a quiescent state.

In the discussion of new *projets* of law, due caution being observed in the publication of the results of the deliberations thereon, the society might lead public opinion. Its decisions, if promulgated after careful discussion, would have great weight with those outside of the profession.

The younger members of the society would have the advantage of listening to the discussion of grave questions, and they would be enabled to benefit by the experience and learning of their more illustrious *confrères*. A spirit of emulation would thus be encouraged, and the profession would be elevated.

Lawyers have no place at present where existing errors or abuses may be criticised. Such a society will afford every member an opportunity to discuss any of these if they exist. At present it is frequently asserted that the Montreal *Bar has no influence*. If this is true the blame rests with every one who contents himself with repeating the assertion without a single personal effort to remove the stigma.

This can only be done by a united effort, "*l'union fait la force.*" A Law Reform Society cannot be carried on by any individual member of the Bar alone.—There must be a combined effort. If the Society is successful, the influence of the profession must be increased.

GEO. W. STEPHENS.

REMARKABLE TRIALS IN LOWER CANADA.

No. 1. Case of Dr. Sabourin.

Under this heading we propose to bring together some of the most interesting and important trials that have taken place in the lower province, and, divesting them of legal forms and technicalities, present them in the style of simple narrative. The records of these trials are not easily accessible to the public, and a brief account, without comment of our own, containing the leading features of the cases, must possess some interest, though, perhaps, not of much practical use to practitioners; occasionally the facts related may involve interesting reminiscences of celebrated members of the bar, and also historical events in the lives of remarkable personages.

The trial of the celebrated case of Dr. Charles Sabourin, of Longueuil, before the Court of Queen's Bench and a mixed jury, at Montreal, on the 14th and 15th April, 1858, is probably fresh in the memory of many of our readers, being generally known as the "Note Swallowing Case." Dr. Sabourin, a gentleman of respectable reputation, residing in Longueuil, was charged with having on the 16th February, 1858, stolen a promissory note for $5,600, due to one Pierre Lucien Malo, a money lender, of Montreal. The judges presiding were the late Chief Justice Lafontaine and the Hon. Judge Aylwin. The case excited great interest, and a formidable array of counsel was retained on either side. Mr. Monk, Q.C., (now assistant judge,) represented the Crown. Messrs. V. P. W. Dorion, Doherty and Papin appeared for the private prosecutor. For the prisoner, the case was conducted by Messrs. Drummond, Q.C., (now Judge Queen's Bench,) Carter and Devlin.

The charge against the prisoner was that on the 16th February, 1858, he entered the office of Mr. Malo, and having got possession of the note, tore it into pieces, chewed the pieces, and swallowed them in Mr. Malo's presence. The principal witness was of course Mr. Malo, and the defence rested mainly on the excellent character borne by the prisoner, contrasted with the ill repute of his accuser. Having premised this much, we shall enter into fuller detail of the trial, and present an abstract of the testimony of Mr. Malo. In opening the case for the Crown, Mr. Monk observed that he had known the prisoner himself for ten or fifteen years, and had formed a high opinion of his personal worth. Judge Aylwin having inquired whether it was understood that the note was not to be produced, Mr. Devlin, in reply, said the defence denied the existence of any such note, and, therefore, they could not produce it. Mr. Drummond objected at the outset to the admission of any evidence about a note not produced, but the objection was not entertained by the Court. Pierre Lucien Malo was then placed in the witness box, and proceeded to recount the extraordinary facts attending the alleged abstraction of the note. He said:

"I live in St. Gabriel Street, Montreal, and have been in the habit of transacting business with the prisoner. On the 13th Nov., 1857, I received his note for $5,600. This note was payable at the Banque du Peuple. It was dated 13th Nov., 1857, and was made payable to the order of Toussaint Daigneau, of Longueuil, three months after date. It was signed by the prisoner, C. Sabourin, and endorsed by Toussaint Daigneau, E. Page, A. Thurber, and P. E. Picault. When this note became due, 16th February, the prisoner came to my office about half-past eleven in the forenoon. My office is on the second flat. I met the prisoner at the door in the street, and we went up stairs together. The prisoner took a seat seven or eight feet from my desk. I asked him if he had brought any money with him. The prisoner answered, very little. I said, 'Such a course will not do; you have been using me in this way a long time. You always tell me you will bring me something, but you never keep your word. It seems you mean to humbug me, so if you don't pay up soon, I will have this note protested, for I don't want to let it go to such an amount that neither you nor your endorsers can pay it.' To this the prisoner answered nothing. I then put the note upon a table near my desk, to see if the prisoner would give me any money, for I had determined to take what money I could get, and take another note. While the note was still on the table, my attention was drawn to the door. I rose from the table on which the note was placed, and on which I had been leaning with my el-

bow, for the purpose of shutting the door. When I had closed the door, I remarked that the prisoner had moved nearer the note in my absence. He then took it up and told me he was going to settle it. He then began to tear it up, and when he had torn it, he put the pieces into his mouth and chewed them. I was so astonished at this that I didn't know how to act, but my second thought was to let the prisoner escape, as I might have no evidence against him; but at last the consideration of the amount outweighed everything else. I then went to the office of Mr. Bedwell, the lawyer, which is in the same building with my own, and told him of the circumstances, but neither of us strove to hinder the prisoner from chewing the note. I then left the prisoner in the custody of Mr. Bedwell and went down stairs to look for a policeman. Having found one, the prisoner was removed to the station. The officials there seemed to laugh at me rather than to pity me. When at the police office I wanted the prisoner to take an emetic, but he would not comply, saying he was not sick, but in good health (laughter.) I swear that the only paper on the table in my office was this note, and that I have never seen it since the prisoner put it in his mouth. About two hours after the prisoner had been lodged in the police station, I got the note protested. The note was in my possession from the time I purchased it to the time it was destroyed."

There is a little obscurity in the report from which the above is condensed as to the time the note came into Mr. Malo's possession, but this is of minor importance. On cross examination, Malo said he thought he paid about $500 for the note, but was very doubtful about the amount. He kept no books for his business.

Mr. Bedwell was called to corroborate Malo's statement. His evidence amounted to this—That he was in his office at the time, and heard a great outcry. Having opened his office door, he saw Malo standing in the passage, and heard him cry, "Mr. Bedwell, the prisoner has stolen my note for $5,600." Bedwell having entered Malo's office, noticed that the prisoner appeared to be chewing and trying to swallow something, which he apparently succeeded in doing. The prisoner seemed anxious to get away. Malo said, "He has eaten my note, and has it in his belly." Bedwell heard the prisoner protest that he owed Malo nothing.

Some of the persons whose names were on the note stated that they had endorsed notes for the prisoner, and some of them had such perfect confidence in him, and found him so punctual in his payments, that they endorsed for him without taking any interest.

The trial being continued on the 15th April, a number of witnesses were called for the defence, the object being mainly to establish that the prisoner had enjoyed a high character for honesty and integrity, while the accuser was known to be a hard man who endeavored to extort as much as possible from his debtors. Dr. Davignon stated he had often remarked that when Dr. Sabourin was excited he appeared to be making attempts to chew or swallow something. This peculiarity was corroborated by other witnesses, several of whom, moreover, swore that they would not believe Malo on oath. There was also evidence of the improbability of Dr. Sabourin requiring the loan of so large a sum of money.

In rebuttal, the Crown called several witnesses who, while admitting that Malo passed for a hard man and a shaver, nevertheless were of opinion that he was to be believed on oath.

Judge Aylwin, in reviewing the evidence, commented with some severity upon the unfavorable character attached to the private prosecutor, and expressed the opinion that his statement could not be credited in the face of the evidence adduced by the defence. A verdict of Not Guilty was then found by the Jury without retiring from the box, a verdict which was received with applause in the Court.

ANALYSIS OF THE JUDGMENTS RENDERED IN THE COURT OF APPEAL —JUNE TERM—MONTREAL.

Judgment was rendered in twenty-two cases, and of the twenty-two judgments of the Court below:—9 were confirmed; 11 were reversed; 1 was reformed; 1 was modified.

AGAIN:—8 were confirmed unani-

mously; 2 were reversed unanimously; 1 was modified unanimously. In 8 there were two dissenting Judges; in 3 there was one dissenting Judge.

Thus out of 22 judgments, 11, or exactly half, were unanimous, probably a larger proportion than usual. In 8 cases there were two dissenting judges, thus rendering the decisions of the three forming the majority of little value as precedents, especially when the remarkable fact is taken into consideration that of the 8 judgments in which there were two dissenting judges, 6 were reversals and one a reformation of the judgment of the court below. Thus, including the judge of the court below with the two dissenting judges, who thought the judgment should be confirmed, we see the vote stand 3 to 3 in all these 7 cases. Several of these involved questions of fact only, and Mr. Justice Meredith intimated his regret that judgments should be reversed where it was simply a question on which side very evenly balanced evidence preponderated.

A DARING FORGERY.

The forgery mentioned in the case of Wenham *v.* Banque du Peuple, reported in this number, is such an extraordinary instance of daring and successful crime, that it may be interesting to advert to some particulars not mentioned in the judgment. During the summer of 1863, Joseph Wenham, Esq., broker, of Montreal, had occasion to be absent from town for several weeks. On his return, having drawn cheques upon two banks at which he had deposits, he was surprised to learn that there were no funds. On enquiry it appeared that during his absence three cheques, purporting to be signed by Mr. Wenham, had been presented at the banks and had been paid. One of these cheques was on the London and Colonial Bank, for $94, dated 4th August, 1863; the other two were on the Bank of Upper Canada, one for $491.15, and the other for $49.13, both dated 17th August, 1863. The signature to these cheques was so exact an imitation, that those who had been for many years acquainted with Mr. Wenham's handwriting could not with certainty distinguish the forgeries from genuine signatures. It was observed as a rather curious circumstance that certain figures recurred in these and all the forged cheques mentioned below. The matter was referred, we believe, to the manager of the Commercial Bank and the cashier of Molsons Bank, who caused an advertisement to be inserted in the daily papers, requesting information from any person through whose hands the cheques might have passed. Mr. Wenham's high personal character caused his assertion that the cheques were forgeries to be readily received. The money was paid over; and there the matter rested, no information being obtained to clear up the mystery.

It was subseqent to this that a second series of forgeries took place, giving rise to the legal proceedings. In the fall of 1864, Mr. Wenham happened to have deposits at four banks. These deposits were merely temporary business deposits, his standing account being at a fifth bank. On the same day a cheque was presented at each of these four banks, purporting to be signed by Mr. Wenham, payable to the order of his associate, Mr. Simpson, and in each case for a sum very nearly the same as that on deposit. The cheques were all paid without any suspicion being awakened, and all turned out to be skilfully executed forgeries. The carrying out of this daring scheme required an exact knowledge of the contents of four different bank books, within a brief interval before the presentation of the cheques. After the first forgery, Mr. Wenham adopted the precaution of making his cheques payable to the order of Mr. Simpson, his associate or partner in his brokerage business, but on the second occasion both names were forged with equal adroitness. The heaviest sufferer by the second forgery, the Banque du Peuple, thought proper to resist payment, and allowed an action to be brought by Mr. Wenham for an amount equal to that of the forged cheque. It was in this case that Mr. Justice Monk pronounced the decision reported elsewhere. The case has since been taken before the Court of Review.

REVIEW.

A DIGESTED INDEX TO THE REPORTED CASES IN LOWER CANADA, contained in the reports of Pyke, Stuart, Revue de Législation, Law Reports, Lower Canada Reports, Lower Canada Jurist, Stuart's Vice-Admiralty cases, and Canada Appeals brought down to January, 1864, to which is added an appendix, comprising Perrault's Précédents de la Prévosté et du Conseil Supérieur, with Tables of Reference, Names of Cases, and a Concordance,—also, Numerous Notes and References, including several important cases not yet reported, by T. K. RAMSAY, Esq., advocate, QUEBEC. Printed by George E. Desbarats, 1865.

We have here a work which may serve as a corner stone of legal literature in Lower Canada—a work not inferior in its kind to anything issued from the American or British Press, and which affords satisfactory evidence that the science of jurisprudence is not in a languishing state amongst us. Dr. Johnson, with that gloomy delight in viewing the dark side of the picture peculiar to him, says the writer of dictionaries has been "considered not the pupil but "the slave of science, the pioneer of "literature, doomed only to remove "rubbish and clear obstructions from "the path through which learning and "genius press forward to conquest and "glory, without bestowing a smile on "the humble drudge that facilitates "their progress." But Johnson himself is an example that genius and industry often go hand in hand, and that the greatest results may be looked for when the two are conjoined.

The design of Mr. Ramsay's work will be best understood by reading the preface, which we give entire:—

"I hold every man a debtor to his profession."
—BACON.

"Reporting is perhaps the most valuable portion of legal literature; but its usefulness for all ordinary purposes becomes impaired, if the reports are not carefully indexed and arranged, from time to time, as their bulk increases. Five years ago our reported cases having swelled in the ten preceding years from five to twenty-one volumes, I began to prepare an index for my own use. Since then I have added the contents of the later volumes, as they appeared, down to the end of 1863; and in part liquidation of the debt claimed by the great English Chancellor, I now offer the compilation thus made, to my brethren of the legal profession, in the hope that, amidst the toil of practice, it may relieve them from the necessity of many a weary and often unsuccessful search.

"In publishing this Index, I am not blind to the many defects of its classification; but after having re-arranged it four times in manuscript, and twice in type, I feel persuaded that it is impossible, within the limits of one volume of reasonable size and cost, so to dispose the matter as not to give ample room for easy criticism in this respect. However, I have endeavored as far as possible to obviate any inconvenience which may arise from imperfect classification by adding three tables—one of reference, a second of the names of parties, and a third of the principal words of the Index wherever they occur. The last table, so far as I know, is a novelty in works of this class, but I think it will be found the most useful of the three.

"I have also condensed and added in an appendix the cases decided in the old Courts of Prévosté and *Conseil Supérieur*, reported in the two small volumes published in 1824, by the late Mr. Perrault, one of the Clerks and Prothonotaries of the Court of Queen's Bench. The judgments in many of these cases will be found to contain very interesting and valuable precedents, and as such, not less binding now than they were under the old *régime*. Indeed it is to be regretted that, in determining the jurisprudence of the country, recourse had not been oftener had to the records of the older courts, and even now it may not be too late to enquire how our predecessors practised and administered the law. In England the Year Books have never been despised, and in France now studious men are beginning to perceive that wisdom is not of any one age, and that no people can with impunity ignore its history and traditions. Are our *olim* unworthy of a thought?

"I need hardly say that the Index comprises the cases in Pyke's Reports, Stuart's Reports, Stuart's Vice-Admiralty Cases, La Revue de Législation et de Jurisprudence, the Law Reporter, the Lower Canada Reports, and the Lower Canada Jurist. I have, however, omitted the Bankrupt cases, which had only interest under the operation of the old Act. Some cases which are not reported are mentioned in the Index, and I have also added a few notes, the last of which gives the judgments in appeal, which affect the cases referred to in the Index, and which are reported in vol. 8 of the Lower Canada Jurist, and vol. 14 of the Lower Canada Reports."

It only remains for us to say a word respecting the manner in which the work has been executed. After a care-

ful examination we are satisfied that the design has been carried out in a way that will not disappoint the expectations which Mr. Ramsay's well-known ability and industry may have excited. As Macaulay says of Johnson's Dictionary, a leisure hour may always be very agreeably (and profitably) spent in turning over its pages. We lay the work down, confident that it will long serve as a worthy monument of Mr. Ramsay's zeal and assiduity.

CORRESPONDENCE.

THE MONTREAL CIRCUIT.

To the Editor of the L. C. Law Journal:

SIR,—Among the subjects which I hope to see taken up by the Law Journal is the system of conducting the Circuit business in this city. Every member of the profession, I presume, is aware of the pressure of business in the Circuit Court. To take a recent instance, the Roll for the 14th June was not commenced till the morning of the 16th. Had not the Court sat on the 16th, all the cases inscribed for the 14th would have gone over to September. What vexatious delays, what enormous waste of time and annoyance to court, counsel and witnesses result from this state of things! I trust, Sir, some one better able to handle the subject will bring it prominently forward, and discuss the best means of remedying an evil which is continually increasing in proportion to the increase of business. Some persons have suggested the appointment of a Commissioner, to sit every morning, or three times a week, for the disposal of all cases under £10. Others would desire simply to have the term extended, say from the 9th to the 16th, both inclusive, with a term in January and July. (I may also mention that the disbursements in small cases are excessive. A poor man cannot attempt to collect a dollar unjustly withheld from him without disbursing 50 cents for the summons, 80 cents for the return, and 60 cents for the execution, besides bailiff's fees, &c.) With reference to the pressure of business, I trust some method may be speedily adopted to put an end to what is considered an intolerable nuisance by

A YOUNG ADVOCATE.

LOWER CANADA LAW REPORTS.

To the Editor of the L. C. Law Journal:

SIR,—I beg to avail myself of the columns of your welcome and much needed Journal to say a few words on the subject of our law reports. How is it, Sir, that the Government continues its support to the Lower Canada Reports, and this in the face of the steady advance made by the Jurist, supported only by the revenue derived from its subscription list? As the subject of the amount which the Government agreed to contribute to the L. C. Reports, is explained at some length in the preface to the first volume of the Jurist, I need not trespass upon your space by entering into particulars. It would appear from that statement that the outside figure for which the Government became liable was £162.10 per annum. But in 1855 the amount drawn from Government had already swollen to £347.18.9 for the year. And turning to the public accounts for 1861, I see that the amount paid by Government "for editing and publishing the Lower Canada Reports," was $2,151.53! In 1862 it was $2,231.94, and in 1863 it had increased to $2,510.95, or about four and a half dollars a page! The publishers might well afford to circulate the Reports gratuitously at this rate. Pray where is this expenditure to end? Is the Government always to pay the bill regardless of the amount? It would seem so; for it has allowed the sum to be doubled since the establishment of the Jurist, the continued issue of which, even in the face of what must be considered as an absurd competition by the Government, has proved that the profession is able and willing to pay for its own reports.

A. H. B.

THE STATE OF ENGLISH LAW: CODIFICATION.

(From the Westminster Review, April, 1865.)

1. Speech of the Lord Chancellor on the Revision of the Law.
2. Address of Sir J. P. Wilde, delivered before the National Association for the Promotion of Social Science.

Nearly half a century has passed away since Bentham wrote his celebrated "Papers relative to Codification," which, though in some respects crude and imperfect, may be regarded as having given the first impetus in this country to the modern ideas on this the most important branch of law reform. And although up to this time but little of tangible result has been obtained, yet symptoms are not wanting that the views propounded by Bentham, and enforced and developed by Sir S. Romilly, J. Austin, and H. S. Maine, are gradually forcing themselves upon the attention of the leading lawyers and jurists. The seed has fallen on a soil not altogether barren, and after a long period of germination, has at length given signs of bursting into blossom. The conviction is getting more and more universal that something must be done to rescue the law from its present chaotic condition, and to control its future growth. It is felt to be a reproach that the country which assumes to be the leader in civilization can point to nothing for her laws but some 1100 volumes of well and ill-decided cases, supplemented by a huge pile of partly operative, partly repealed statutes, the whole arranged on that worst of all possible plans—a chronological one. It is seen that legal principles and legal rules which are daily enunciated by counsel at the bar and judges on the bench must, from the nature of the case, admit of being expressed in intelligible language, and of being grouped in an accessible form. On the other hand, the real difficulties to be overcome in recasting the law are, perhaps, not sufficiently appreciated by many of those who feel most strongly that the law ought not to remain in its present shape. It is not uncommon for those who have had no practical experience, who have never tried their hands at framing a rule of law, to suppose that the task is a simple one, and to suspect that the difficulties are created by those whose interest it is that the law should not become too readily *cognoscible*. Those who think thus would do well to ponder the words of the late Mr. Austin, whose competence as an authority will not be questioned. Mr. Austin ("Jurisprudence," vol. ii, p. 370,) writes:

"Whoever has considered the difficulty of making a good statute will not think lightly of the difficulty of making a code. To conceive distinctly the general purpose of a statute; to conceive distinctly the subordinate provisions through which its general purpose must be accomplished, and to express that general purpose and those subordinate provisions in perfectly adequate and not ambiguous language, is a business of extreme delicacy and of extreme difficulty, though it is frequently tossed by legislators to inferior and incompetent workmen. I will venture to affirm that what is commonly called the *technical* part of legislation is incomparably more difficult than what may be styled the *ethical*. In other words, it is far easier to conceive justly what would be useful law than so to construct that same law that it may accomplish the design of the lawgiver."

Such is the opinion of one of the acutest of thinkers and most ardent of law reformers, and there can be little doubt that every practical draughtsman will add his testimony on the same side. Indeed, it is probable that a sense of the magnitude and difficulty of the undertaking has operated fully as much as any other cause to deter our lawyers from attempting the consolidation and re-arrangement of our statute and case law. However, there are signs—and among them none more noteworthy than the remarkable addresses which form the subject of this paper—that the attempt will be made and at no distant period. The present, therefore, seems a suitable time for drawing attention to the subject, and for giving a fair consideration to the arguments of those who are opposed to codification. For it is the fact that some lawyers of eminence have doubted and still doubt the possibility of success in this work. It is argued that a code will introduce greater evils than those it cures; that the wisest legislator can foresee only a small part of the combinations to which human affairs will give rise; and that the infirmities of language will not allow him adequately to provide for the cases he does foresee. Appeal is made, in confirmation, to the actual working of existing codes, all of which, it is said, are, in fact, supplemented by a mass of comment and traditional interpretation far exceeding in bulk the codes themselves. We shall examine in due course the value of these

arguments. We believe it will be found that the objections raised apply rather to a code in the form in which it is commonly proposed that it should be cast, than to a code in the best form in which it is possible to cast it. We think the error of most codifiers has been to rely on the exclusive use of tersely-worded abstract propositions, each intended by force of the language used to indicate with accuracy its own scope—to strive against the imputation of repetition—to be sparing of illustration—to dispense almost entirely with explanation, and generally to render their productions dry and colorless collections of formulæ, rather than clear statements of principle expounded and explained by comment and by example.

In order to substantiate our position, as well as to convey some idea of the real work which has to be done and the advantages which will result from its accomplishment, it is necessary to exhibit the actual state of our law, the process by which it has been developed into its present shape, and the mode in which the vast and intricate storehouses of legal knowledge are made available. We shall therefore, in the first place, offer such a sketch as is necessary to the comprehension of the question to be discussed, avoiding as far as possible the use of technical language, and availing ourselves freely of the materials which the Lord Chancellor and Sir J. P. Wilde have provided.

The law of this country may be divided into two classes, the law which has been expressly enacted by the Legislature, called the written or statute law; and the law which has grown up without express legislative sanction, and which is sometimes called the unwritten law. The latter class comprises what is designated the Common Law, and also a body of law known as Equity or Chancery Law, of comparatively modern origin, and intended to supplement and correct the Common Law. The origin of the Common Law is thus described by the Lord Chancellor:

"Of the Common Law, much, no doubt, consisted originally of customs and usages, recorded only in the memories of men; much of rules embodied in acts of the Great Council, of which no record now exists; much was derived from the Civil Law, relics of the old Roman jurisprudence, which remained so long through the land; and much was deduced from general maxims and principles handed down from one generation of lawyers to another. Thus, the sources of Common Law were in ancient times of the most indefinite character, and the power or liberty of judicial decision was equally unlimited."—P. 5.

In the reign of Edward I. the practice of reporting the decisions of the judges began, and thus was added a fresh authority which might be referred to as evidence of what the Common Law was. Gradually arose the habit of appealing to a reported decision as a sufficient ground for deciding a parallel case in like manner, and precedent was allowed to rule, in some cases to the exclusion of justice.

We will now leave the Common Law and direct our attention to Equity or Chancery Law. The growth of Chancery Law is a striking illustration of the means to which recourse is had when the Legislature neglects its obvious functions. At a period when the nation had outgrown the old Common Law, and the Judges of the Common Law Courts were too narrow or too timid to assume the requisite legislative powers, the Chancellors, as keepers of the King's conscience, undertook to supply what was wanting, and to correct what was amiss out of the reserve fund of Equity supposed to reside in the royal breast. It was in the nature of things that the establishment of this right of interference should introduce uncertainty. The effect was thus described two centuries and a half ago.—(Selden's "Table Talk," Singer's edition, p. 49.)

"Equity in law is the same as the spirit is in religion—what every one pleases to make it. Sometimes they go according to the conscience, sometimes according to law, sometimes according to the Rule of Court. Equity is a roguish thing; for law we have a measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the standard for the measure we call a foot, a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot; 'tis the same thing in the Chancellor's conscience."

So defective, however, was the Common Law, that it is impossible to doubt that the interference of the Chancellors has, on the whole, been salutary; and the authority of Chancery proceedings having long been fully established, the uncertainty of which Selden complained, has ceased to exist. The Courts of Common Law did not adopt the Chancery doctrines, and the only mode the Chancellor possessed of en-

forcing his decrees was to imprison those who refused to submit to them. Thus arose the remarkable anomaly of two legal systems, in many respects antagonistic, existing side by side in the same country. To this day a man may win his cause at Westminster and lose it at Lincoln's Inn. To this day a person with an unquestionable right may have no means of asserting it except by asking the Court of Chancery to prevent another from disputing it. Truly a singular spectacle in this 19th century, a Lord Chancellor restraining a subject, under pain of imprisonment, from appealing to the ordinary Courts of Justice!

To complete the picture of our legal system, we have the Statute Law or Parliamentary legislation commencing with the 20th Henry III., and contained in some forty-five thick quarto volumes. "The statutes are printed without the least regard to order; there is no system or arrangement. They are printed just as they have been passed, chronologically. There is of course a great variety of subjects, and enactments on the same subjects are dispersed and scattered over an immense extent of ground." P. 22. Many of the Statutes were temporary in their nature, or have been wholly or partially repealed, some by express enactment, others only inferentially, so that it is often a work of difficulty to discover what provisions are in force on a particular subject. When the provisions still in operation have been ascertained, there remains the task of interpretation, which requires for its performance a competent knowledge of the Common and Chancery Law, and also of the particular judicial decisions on the constructions of the clauses under consideration. Every decision on the construction of a Statute is virtually incorporated with the Statute to which it refers, and in this way many Statutes have become so loaded with commentary that their original features can with difficulty be recognized.

Such then is England's code. We have the *lex scripta*, or Statute Law, and we have the *lex non scripta*, consisting of a body of rules nowhere stated in express terms, but to be inferred from the many thousand decisions contained in the reports. There can be no doubt wherein lies the most palpable defect in our legal system. It is that our laws are accessible with difficulty even to the trained lawyer, while to the public they are almost a sealed book. When a case is laid before a lawyer for his advice he has no authoritative text to which he can refer for the principle which is to guide him. Beyond the maxims with which, through long experience, his mind has become impregnated, he can rely on nothing but such light as the decided cases may afford. Frequently he will have to wade through the tedious details of twenty or thirty cases in search of a single rule —cases, be it remembered, not manufactured for the purpose of illustrating legal principles, not reduced to their simplest possible forms, but presented with all the complexities with which matters of actual experience are commonly surrounded. Not unfrequently, in order that the precise grounds of a single decision may be understood, it is necessary to peruse also the cases cited in the judgment or referred to in the argument. Not until the lawyer has gone through the laborious process of comparing case with case, eliminating and rejecting what is immaterial from each, can he arrive at a satisfactory conclusion. But his labor is not confined to the mere examination of specified cases. He has, as a necessary preliminary, to find out what cases are worthy of being consulted with reference to the subject in hand, and must satisfy himself that every case of importance has been included in his examination. This part of the task alone would be well nigh impossible but for the assistance he derives from treatises—that is, from the labors of unauthorized codifiers. And valuable though the help obtained from these sources is, yet no treatise can relieve the lawyer from the necessity of consulting the original records. The dictum of a text-writer has no authority binding on a judge; it can only be regarded as the opinion of the author—an opinion, in many instances, entitled to high respect, but still an opinion only. Even the propositions laid down by writers accounted of almost judicial authority require to be explained and limited by reference to the cases from which they have been extracted before they can be acted on with confidence. A text-book is, therefore, little more than an elaborate index to the cases, accompanied by suggestions, often of the greatest value, as to the rules and principles which the cases may be made to yield up.

The difficulty of discovering the law which is felt by the experienced lawyer, nay, even by the judge on the bench, weighs with tenfold force upon the student. To him the area of the law is indeed a "tangled thicket," requiring the application of unceasing energy and untiring industry before it can become in any sense a "dis-

triot set out in order." After he has mastered a few elementary treatises, sufficient to put him in possession of the technical terms, and of a certain number of rules of every-day application, he can do little beyond watching the course of business in the chambers of a practitioner, and reading the fresh decisions as they make their appearance. These he has to arrange and classify for himself as best he can, trusting to time and experience to weld together into a harmonious whole the accumulated fragments. Can it be wondered that with these drawbacks many should abandon in despair the attempt to grasp the law as a science, and should content themselves with committing to memory isolated precepts, and with mastering the petty details of every-day practice?

In short, the process of discovering and acquiring the law is one which involves a wasteful expenditure of time and labor—wasteful because admitting of enormous reduction. That which should be settled and proclaimed by authority once for all, has to be worked out by hundreds of individuals each for himself. Did we possess a systematized body of law, we should have more earnest students, more skilful lawyers, and better and cheaper justice. That the acquisition of the law can ever be an easy task, or its administration otherwise than burdensome, it were folly to expect; but there can be no reason why an effort should not be made to aid the practitioner and to ease the suitor. The two results go hand in hand; whatever tends to simplify the law and to render it cognoscible and easy of access, tends also to diminish the heavy fees and vexatious delays, and the occasional miscarriages which are now so justly complained of.

[The Reviewer, after commenting upon the conflicting systems of Common Law and Chancery Law, and the cumbrous laws regulating transfers and mortgages in England, proceeds:—]

We have given evidence, we trust of a sufficiently cogent character, in support of the view that inaccessibility is the master-vice of our legal system. It remains to be added that the mischief is multiplying at an alarming rate, and bids fair at no distant date to expand into truly formidable dimensions. The Case Law is stated by the Lord Chancellor already to occupy between 1100 and 1200 volumes, and is growing with constantly increasing rapidity.

"At this time there are at least forty or fifty distinct sets of reports pouring their streams into the immense reservoir of law, and creating what can hardly be described, but may be denominated a great chaos of judicial legislation."—P. 8.

Sir J. P. Wilde also bears testimony to the vast increase of reported cases in modern times:—

"I do not stop to inquire into causes, but the fact is that the present century has added more decided cases to the law then are to be found in the records of the five preceding centuries put together. This vast agglomeration breeds not only confusion in those who are bound by the law, but inconsistency in those who administer it. No power of assimilation can keep pace with such production, and the tribunals, occupied to the full with the business before them, have little time to master the results of contemporary decisions."

A second defect in the law as it is, though in our view one of which the extent is somewhat overrated, is want of certainty. The system of precedent, which on the whole tends to fix the law even down to minute details, works in some instances in the contrary direction, and instead of removing doubt, introduces it. The result is brought about through the agency of vicious precedents. Judges are not infallible, and though actuated by the purest intentions, they sometimes decide wrongly. Such decisions are nevertheless available for citation, like all other precedents. Now, when an erroneous decision in the past comes to be pressed upon a judge in the present, one of two things must happen—either the precedent must be followed, or it must be disregarded. The traditions of the profession point in one direction, while the instinct of justice exercises its influence in the opposite. The result is oftentimes a compromise. The decision is in effect disregarded, but its authority is saved by recourse being had to some shadowy and fictitious distinction. This practice was recently satirized by a living judge, who, on a case which we will call "Brown *v.* Robinson" being cited in the argument, informed the bar that he should not feel himself bound by that case unless a suit were before him in which the facts were precisely similar; "indeed," added his lordship, "unless the plaintiff's name were Brown, and the defendant's Robinson."

In this way an erroneous judgment, though outwardly treated with respect, may get undermined with distinctions which render it practically inoperative, and at this crisis it commonly happens that some judge, bolder than the rest,

deals a death-blow to the tottering structure by declaring that "that case has long since been overruled." A striking instance of an important modification of the law by a single decision occurred quite recently. Five years ago it was universally believed among lawyers that, if A lent B a sum of money to be employed by him in business, A's remuneration for the loan being a certain share of the profits, that agreement rendered A liable to the creditors of the business to the last farthing of his property; in other words, that in favor of creditors, participation in profits was a criterion of partnership. Such was the distinct tenor of a long series of cases, "because," as it was sagely said, "the assets are the source to which the creditors look for payment; and therefore, he who shares the profits must also share the losses." However, the House of Lords, by a recent judgment, has gone far towards demolishing the old doctrine, and substituting the reasonable principle that partnership or no partnership is simply a matter of agreement between the parties, that creditors have no concern with the question, except so far as they have been induced to believe that a partnership really subsisted, and that participation in the profits is only to be regarded as *prima facie* evidence of a contract of partnership. Here we have an example of a sudden and unexpected change of the law. More commonly, however, the elimination of a well-rooted but vicious precedent is effected by slow degrees, and while the process is going on the point of law under treatment is necessarily to some extent in a state of uncertainty.

It is, then, impossible to deny that on many points there is a conflict of authority, and also that there is danger in trusting too implicitly to decisions of which the propriety may appear doubtful. Still, on the whole, it cannot be said that the uncertainty due to these causes is practically felt to any great extent. The able and experienced lawyer who is willing to devote the necessary time and labor to the consideration of the points submitted to him, can, generally speaking, arrive at a trustworthy conclusion. The cases are comparatively rare in which he will find it difficult or impossible to decide with confidence on the relative values of competing authorities.

How, then, it may be asked, is it that the "glorious uncertainty of the law" has passed into a proverb? The answer is not difficult. In one-half of the cases in which the phrase is used the meaning is simply the glorious difficulty of proving a disputed fact, and in the other half the impression as often as not has reference to the large discretion which is necessarily entrusted to juries. How, for instance, would it be possible to lay down a body of rules which should be applicable without fail to the measure of damage in any instance? Manifestly a discretion must be reposed in the jury, and their verdict must often be a matter of uncertainty. Nor should it be forgotten that points of real doubt and difficulty must frequently present themselves, and that such cases are precisely the ones which are litigated. It would therefore be unfair to judge the law, as is often done, solely by the litigated cases, without taking into account the overwhelming majority of cases in which its work is done effectually, though in silence and secrecy. Much, then, of the uncertainty of the law is in the nature of things inevitable. It is found under every legal system, and will remain even though our code were as perfect as human ingenuity could make it. On the other hand, there can be no reason why such of the uncertainty as is due to the conflict of authority should be permitted to remain. The suppression of erroneous precedents is plainly a desideratum, and can be attained only by means of such a survey of the entire field as, for other and more important ends, we desire to see undertaken.

We have endeavored to depict the principal inconveniences to which our legal system gives rise; it remains to consider whether a remedy can be found. Is it possible to recast the existing law in a more intelligible, more certain, and more accessible form, without sacrificing anything that is valuable in the present system? We do not hesitate to answer this question in the affirmative. The rules of law exist, though they are only to be discovered by a process of comparison and inference. It must therefore be *possible* to extract them from the mass in which they lie imbedded, and to arrange them systematically. In the words of Mr. Austin, "Jurisprudence," vol. ii. p. 377,—

"Rules of judiciary law are not decided cases, but the *general* grounds or principles (or the *rationes decidendi*) whereon the cases are decided. Now, by the practical admission of those who apply these grounds or principles, they may be codified or turned into statute laws. For what is that process of induction by which the principle is gathered before it is applied, but this very process of codifying such principles, performed on a particular occasion, and performed on a small scale? If it be possible to extract

from a case or from a few cases the *ratio decidendi*, or general principle of decision, it is possible to extract from all decided cases their respective grounds of decision, and to turn them into a body of law abstract in its form and therefore compact and accessible. Assuming that judiciary law is really law, it clearly may be codified."

"Not so," reply the opponents of codification; "it is impossible to frame rules which shall with certainty catch just all the cases which the legislature intends to include and no more. Language is not sufficiently definite for the purpose, and rules which seem perfectly plain and satisfactory to the draughtsman (who, of course, knows his own meaning), will be found open to numerous doubts and susceptible of a variety of interpretations when they come to be tested before the judges." Now we are perfectly willing to admit that, so long as a code consists only of general rules, formidable difficulties of interpretation will assuredly present themselves, but we contend that this objection may be effectually surmounted by the simple expedient of appending to the rules a sufficient sample of the special instances which suggest them. Rules so illustrated carry their own interpretation; the illustrative cases are, in fact, precedents, and the rules no more than a statement of that which the cases involve. No greater difficulty could therefore be felt in applying the rules than in applying the precedents, as at present, apart from the rules. Indeed, we have positive proof of the ease with which illustrated rules are applied. For what are the dicta of eminent judges and text-writers but illustrated rules? Many of these dicta have the authority of settled law, and no serious difficulties are found to arise in the process of interpreting them. Why? Simply because such dicta are always viewed with reference to the cases which gave birth to them. Manifestly the same result would follow if the rules were laid down by an authority higher than either judge or text-writer—provided, that is, the rules were still united to the illustrative cases, and interpreted by reference to them. But, it is argued, granted that by means of the free use of illustration the legislator can include all the cases he has in his mind, how is he to frame his rules so that they may be applicable to *unforeseen* combinations of facts? So long as a rule of law exists only by implication in a series of decided cases, it possesses more or less of an undefined or elastic character, and in applying such a rule to new cases a judge has present in his mind the principle of expediency by which the rule is justified, and thus a safeguard is provided against a too rigid adherence to the rule in cases which might fall within it if it were reduced into set terms. However carefully the codifier may frame his abstract propositions, there is perpetual danger that his words, legitimately interpreted, will extend to cases which, if they had originally fallen within his contemplation, he would certainly have excluded. In the words of an able writer, ("The Jurist," New Series, vol. IX, part ii, p. 341)—

"We defy the ablest extractor of principles to codify any single branch or subject of judiciary law in such a manner as to anticipate and provide for future cases with a tithe of the completeness and certainty with which they are anticipated and provided for by the uncodified precedents; and this for the reasons already given—that the precedents are not bound in the fetters of set terms, and that their full import and application are inexhaustible and unknown even to those who make them, and can only be brought out step by step as new cases arise." ..... (Ibid, Page 340.) "The history of every head of judiciary law is, that first a case arises in which a general principle is established and applied; then cases arise which determine the limitations and exceptions. A principle caught by a codifier in the first stage of its development would be enacted in all the generality of a neat rule, without qualification or exception, and capable of none save by very rough nursing in the courts."

This argument is certainly plausible, and has appeared to many conclusive. We conceive the answer to be that no code should attempt to provide for unforeseen cases by means of detailed rules. It is perfectly obvious that any such attempt must be unsuccessful. It would, no doubt, be practicable to include all possible cases in a set of highly general principles or maxims, but such maxims would be valueless from their vagueness. In order that the rules of law may be useful, they must enter into considerable minuteness of detail: and, as a necessary result, much must be left unprovided for, because unforeseen. But, it will be asked, if the code does not provide rules which will take in unforeseen cases, how are such cases to be decided? We reply, in the same way as they are now decided, namely, by an appeal to considerations of equity and expediency. At present every judge holds himself justified in resorting to these fundamental principles so long as his decisions are not inconsistent with the general spirit or the details of the settled law, and we are unable to see that this liberty would be in any degree interfered with by a new arrangement of a settled law on a different plan. So long as the spirit of the law as shown by the illustrative cases is taken as the guide to interpretation, there can be no danger that a code will give rise to narrow and hurtful decisions. It may be urged that in addition to the mere decisions our books contain the reasonings of the judges, and that the study of these is of material assistance towards grasping the true spirit of the law. To this we fully assent, and we would therefore add to the code wherever needful and practicable, the reasons by which the rules are justified. We cannot but think that this element would be found of great value, both as affording an indication of the limits of the various rules, and as guiding to the decision of unforeseen questions. The maxim, *cessante ratione legis cessat ipsa lex*, would be applicable then as now, and the judges would still retain the liberty they now enjoy of resorting to first principles when occasion required.

We think, then, it is clear that the sacrifice of the power of development—so far, that is, as

development consists in the application of old principles to new instances—is not a necessary consequence of a re-arrangement of the law in the form of a code. We are aware that there is another kind of so-called development—namely, that which consists in the actual alteration of established rules. To this species of development a code would, no doubt, prove a serious obstacle. This we are far from regarding as a mischief. On the contrary, we count it one of the least advantages of a code that it proclaims the law as it is, be it good or be it bad, throwing the responsibility, where it ought to fall, on the Legislature. Among less advanced communities Fiction and Equity may be the appropriate modes of counteracting hurtful laws. In this country their day is well-nigh over, and for the future, direct legislation may be looked to as the only source of improvement.

To recapitulate: A good code should, in our view, comprise three elements—rules, illustrative cases, and comments or reasons; the rules serving to formulate the law and to give it expression in concise terms; the cases and comments serving to explain the rules and to secure to the law the attribute of elasticity. We would incorporate into our code such of the reported cases as appeared to be of value as precedents—not, indeed, in their present shape, but stripped of all unnecessary complexities and trimmed into manageable dimensions. We would add such further cases as might suggest themselves and as were calculated to throw light on the text. We would exhibit the reasons of the various rules, their origin and inter-dependence, wherever such a course seemed necessary for enabling their meaning and spirit to be fully grasped; and for this purpose we would avail ourselves of the labors of our judges and our text-writers. In short, our code should be modelled after the fashion of the best treatises, equalling them in point of clearness and logical arrangement, and far surpassing them in authority and in completeness. The plan of codification here suggested coincides substantially with that proposed by Sir J. P. Wilde, as we understand him. He is in favor of an authorised text, illustrated by the whole of the cases, arguments and judgments in our books, except such as may be authoritatively condemned. Now, while thoroughly agreeing with this scheme in its essential features, we cannot but think that far better, and far more concise illustrations could be given than those contained in the reports. As a general rule, the pith of a reported case—all that is really valuable in point of illustration of legal principles—can be set down in one-tenth part of the space that the report occupies. To retain, then, the main bulk of our cases would be, as we conceive, to maintain one of the most prominent and rapidly growing evils of the present system.

The idea of an illustrated text is not a new one. It was first brought prominently forward by the framers of the Indian Penal Code.... There is one argument against immediate codification which we have not yet mentioned, but which calls for notice as it has apparently received the sanction of no less an authority than the Lord Chancellor. It is this: that codification cannot be successful until the body of the law has been purged of the grave inconsistencies by which it is now disfigured. On this ground Lord Westbury advocates for the present no more than the weeding of the statutes and cases, and the re-arrangement of the purified material, without alteration in point of expression, according to the subjects—that is, the formation of a digest ...We do not dispute the utility of Lord Westbury's plan, but we are unwilling that the work of codification should be postponed, as it appears to us, unnecessarily. We consider that a preliminary digest would be a good thing, but a preliminary code a better, and for this reason, that a code tells us what the law is, and in the shortest form compatible with clearness, while a digest still leaves the law to be inferred, and still leaves the mass of material bulky, complex, and, save to the initiated, incomprehensible. The example of text-writers proves conclusively that a digest is not *essential* as an intermediate step, since all the best text-writers attempt, and many of them with marked success, to discover and arrange the rules and principles involved in the decided cases.

That which has been done successfully by text-writers, we desire with Sir J. P. Wilde to see attempted on a large scale and by authority, and we concur with him in thinking that the work may be accomplished piecemeal. It would be necessary to repeal nothing expressly, though of course some existing precedents would be rendered nugatory by the adoption of others inconsistent with them. On the completion of any section, it would be sufficient to enact that its provisions should be conclusive as to all matters falling within their scope, leaving all matters not falling within the provisions of the completed sections to be decided in the same way as they are decided at present. Step by step every branch of the law could be added, except such—constitutional law, for example—as it might be considered inexpedient to meddle with. When all the sections were completed, we should have an authority sufficient for all ordinary purposes. The first question for the lawyer would be, Can the point under consideration be solved by an appeal to the code? If, as would occasionally happen, the provisions of the code proved insufficient, then, and then only, should recourse be allowed to other authority. In this way the law would be rendered easy of access, while an efficient safeguard would be provided against the consequences of unavoidable imperfection or intentional omission.

It forms no part of our present purpose to enter into a minute discussion of the precise machinery by which the work of codification may be carried on. It is sufficient to state that it would certainly be necessary to secure the exclusive services of six or eight highly skilled, and of course highly-paid, men to prepare the necessary measures for Parliament. To such a body might fitly be assigned the permanent duty of a general superintendence of the form of our legislation, and of a periodical revision of the fresh cases, so as to keep the code on a level with the later developments.

LAW REPORTING IN ENGLAND.

(From Fraser's Magazine.)

At the numerous and influential meeting of the bar convened by the Attorney-General on the 2nd December, 1864, a large majority affirmed Mr. Daniel's resolution—'That the present system of preparing, editing, and publishing the reports of judicial decisions in this country requires amendment;' and a committee of gentlemen, fairly representing the different grades and interests of the profession, was appointed to consider and report to a future meeting the best means of improving the system.

Pending the labors of that committee, it may not be out of place to lay before our readers some observations upon the subject of the present system of law reporting, and the objections which are urged against it—a subject which does not concern the bar alone, but is one in which the community at large have, though they may not take, a deep interest; is also one on which those who are not lawyers by profession are, in many instances, without very definite ideas, or very accurate information. In the first place let us explain what Law Reports are. Law Reports are a collection of permanent records of the material facts, proceedings, arguments of counsel, and judicial decisions of Courts of justice, in cases brought before those Courts for decision, purporting to be made by persons present at the argument and determination of the cases. (The necessarily ephemeral and incomplete accounts of the proceedings of the Courts which appear in the daily newspapers do not deserve the name of reports, and, as a rule, cannot be referred to as such by counsel. Thus, for instance, in the *Alexandra* case, counsel were not permitted by the Court of Exchequer to read from a report of a case in the *Times*.) The judicial decisions thus recorded are applications, by the Courts, of the law to the facts of the cases reported. In theory, though not always, it is to be feared, in practice, they are enunciations by the judges of the law which already exists, not of a law then first promulgated; the judges being bound *jus dicere* not *jus dare*. The reports, then, are chronicles of determinations of points of law, not of points of fact. It may be added that a great majority of the reports are records of the decisions of full Courts, not of individual judges of the Courts....The reporters in the different Courts below generally follow cases appealed into the Courts of Appeal, and include the decisions of those Courts upon them in their reports; some reporters thus following a case no further than into the first Court of Appeal; others tracing it to its ultimate fate before the House of Lords, if thither it goes. Reports of the decisions of the House of Lords in appeal cases are also published in a series by themselves, as are those of decisions of the Judicial Committee of the Privy Council, in cases in which an appeal lies to that body.

Thus far, then, we have seen that Law Reports are embodiments, in a permanent form, of the material facts, proceedings, arguments of counsel, and judicial opinions of our Courts upon the law applicable to the facts, in cases heard and determined in the Courts of original and appellate jurisdiction in this country. When we have said that the decisions of the Superior Courts, and the Courts of high jurisdiction only are in practice reported—that no one, for instance, now puts into print the decrees of a County Court judge—we have said enough to indicate the extreme importance of the subject matter with which the Reports are concerned. In them will be found the muniments of the rights and the measure of the obligations of all classes of the community.

(After describing the process of reporting the writer proceeds to remark:)

Thus, then, are the Law Reports prepared and edited by private individuals, wholly independent of State or judicial control. And as they are prepared and edited, so are they also published by private enterprise. The irregular reports are regular in their irregularity, some of them appearing in weekly, others in monthly parts: the regular reports are so far irregular in their regularity that they appear in parts at fitful and uncertain intervals, as it suits the convenience of their authors to issue them.

There are many who deprecate a system of jurisprudence in which 'case law' finds a recognized place. They sigh for a code to whose procustean sections they may refer every complicated knot in human affairs for solution. Failing this, they would disentangle every such knot by an appeal to first principles only, not also by researches into the manner in which deft fingers have before untwisted similar strands. We shrewdly suspect the majority of such objectors are not gifted with that faculty so useful to the working lawyer, a memory for cases, and that their want of this faculty has much to do with the vehemence

with which they disparage it. Be this as it may, it is certain that the law of England is, and will long continue to be, based on a respect for precedent, that is, previous decisions. For instance, the works of eminent writers on the law are often referred to in argument, as throwing light upon the subject before the Court; but the opinion of any such writer is as dust in the balance against the weight which the Court will attribute to the decision of a Court of co-ordinate jurisdiction, provided it is unreversed and can be appealed from. In the language of Chief Baron Pollock, 'the rule is this: that wherever there is a decision of a Court of concurrent jurisdiction, the other Courts will adopt that as the basis of their decision, provided it can be appealed from. If it cannot be appealed from, then they will exercise their own judgment.'

Such being the respect paid by our law to authority, one of the chief matters into which our Courts inquire, in all questions of law which come before them, is whether or not the point at issue has been before decided in a manner which is binding upon the Court where it is now mooted. If it has, the point is said to be concluded by authority, and the Court gives judgment accordingly.

The labors, then, of the law reporter not only furnish the chief staple of forensic argument, but upon them mainly hinges all judicial determination. Whence it is obvious that it is of the highest importance to the community at large that the law reports should be accurate and authentic; also, that they should be published with all possible expedition. The present system of reporting is charged with a failure to secure these desirable results. Accuracy and authenticity, it is said, are rendered impossible both by the number of reports of the same cases and the method by which they are produced. Judges are enabled to disclaim having used the expressions attributed to them, and no one can predicate whether they will follow this, that, or any version.

Those who thus condemn the present system have a panacea to suggest for all its alleged mischiefs. The State, say they, is bound to take the duty of law-reporting upon herself. Let, therefore, a staff of barristers be appointed for each Court, as its official reporters, with fixed salaries, paid by the country; and let them give up private practice at the bar, devoting themselves entirely to their official duties. Let there be some revision of the reports which they draw up, before publication, whether by the judges of the Court or a permanent board, to be appointed as editors. Let the judges revise all judgments which are to go forth under the sanction of their names; and let them deliver none but written judgments in all cases, as is now the practice of the judges of the Roman rota, and of our own judges in India. Let the Courts allow only the official reports to be cited as authoritative and authentic. Let a complete report of each decision be published, written, at most, three months after the Court pronounces it, and a short abstract of it be issued by the reporters at an even earlier period. Let, lastly, the price of the Reports be such as to bring them within the reach of the most moderate means.

Many, on the other hand, take exception to these proposals. In their opinion, the system now prevailing best secures faithful and impartial reports. *Nescit vox missa reverti*, as now uttered by the judges in the ears of independent chroniclers; if revocable after utterance, would it not cultivate an *animus revertendi*? Again some, at all events, of a multitude of independent chroniclers must chronicle aright; all of a paucity of official chroniclers may often chronicle wrongly. Indolence, distaste, and carelessness are ever plants of rapid growth in an official bosom; and can such plants put forth healthful printed leaves?

For our own part, we doubt whether the discrepancy of the reports, as at present compiled, *inter se*, is not much exaggerated. That they necessarily vary greatly in precision and completeness must be admitted. The advantages of a single authentic version, prepared by gentlemen in whom the profession—and therefore the public—could feel confidence, would be undeniably great. We doubt, however, whether reporters ought not to remain, as at present, independent of the control of judges; and we should assuredly hesitate long before approving their conversion into mere officials, debarred from that private practice which is not only their best teacher, but their strong incentive to excellence. (Reporters have often been elevated to, and proved distinguished ornaments of the Bench. We may instance the names of Jervis, Cresswell, Alderson, amongst the past: of Crompton and Blackburn amongst present Judges. Also, Sir C. H. Scotland, Chief Justice of Madras.) Again, it appears to us that the business of the Courts could scarcely be carried on, were judges required to put their judgments into writing in all cases; and that in very many cases written judgments are not called for.

In conclusion, let us point out what appear to us to be two great and crying evils in the present system. The first and foremost is the indiscriminate publication, now permitted, of each and every case that is decided. The other evil is the undue haste with which some, and the undue delay with which others of the Reports record the decisions of the Courts.

LAW REPORTING IN ENGLAND.

(From Fraser's Magazine.)

At the numerous and influential meeting the bar convened by the Attorney-General the 2nd December, 1864, a large majority ed Mr. Daniel's resolution—'That the system of preparing, editing, and publi reports of judicial decisions in this quires amendment;' and a commit men, fairly representing the differ interests of the profession, w consider and report to a futur means of improving the sy

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* Many of the reports inserted here are intended principally for present perusal, and not for future reference, being merely notes of the judgments taken in Court, condensed into the smallest possible space. The reports we may add, have all been submitted to the Judges for correction.

...ıort et vir *vs.* MARTINEAU.—BADGLEY, J. ...the plaintiffs in this case sued on a con... made at Verchères, the action being brought to recover $112, the balance of moneys which they had advanced to the defendant to purchase grain. The latter wished to file a declinatory exception, alleging that the summons was wrongly issued here, because the contract was made in the district of Richelieu. But this exception, owing to irregularities, was not in the record at all. This ground was also irregularly taken in the plea to the merits, and of course could not stand there; but in fact the objection could not hold, because the whole cause of action was in this district, the contract was made at Verchères, and the unemployed money sought to be recovered back was handed to the defendant there by the plaintiff. There was another objection, that the judgment was null because there were no *motifs*. But the judgment was sufficiently *motivé* because it adopted a full and circumstantial report of M. Labadie, to whom the matters in contest between the parties and the establishment of the balance between them had been referred. The judgment must be confirmed.

MONK, J., said he had a good deal of difficulty in concurring in the judgment. First, as

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ation that his Honor felt justified in saying that no declinatory exception had been produced. It would be the duty of the Court, if it found that the cause of action arose in the district of Richelieu, to say that it had no jurisdiction. The Court was, therefore, brought directly to the question of the contract. His Honor, after reviewing the details of the contract, came to the conclusion that defendant was rightly sued in this district.—Judgment confirmed.

DUGUAY *vs.* SENECAL.—BADGLEY, J.—The defendant, Senecal, made his promissory note in favor of Joubert. The note was not paid at maturity, and Joubert did not protest it, but some time after the note became due, he purchased from Duguay, the plaintiff, certain effects, and endorsed this overdue note to plaintiff in part payment. The note not being paid, the plaintiff sued the defendant (the maker,) for the amount. The plea was, freedom from liability owing to want of protest. Now there was nothing to prevent the payee of a note from transferring it after it became due. The only difference was that the maker would have a right to plead against the endorsee all the equities that might have arisen in the meantime between himself and the payee. The judgment of the Court below, which was in favor of plaintiff, must be confirmed.

HALL *vs.* BRIGHAM.—BADGLEY, J., said the record in this case had become considerably complicated, but the Court was disposed to confirm the judgment as far as it went now. It was merely for the purpose of enabling an *expertise* to take place.

MONK, J., said the objection to this judgment was that in a case of ejectment there was no such thing as an *expertise* to determine the rights of the parties. This was laying down a general principle which was scarcely sound. Every rule of law had its exceptions, and the one above cited in no wise bound the Court. It would manifestly interfere sometimes with proceedings before the Court. The Court did not feel disposed to disturb the judgment, though a careful analysis of it would be curious and might be edifying.—Judgment confirmed.

FLETCHER *vs.* PERILLARD.—BADGLEY, J.—

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sideration money. This would be 1,50
of which 1,200 were actually paid to him,
shown by the deed. The defendant, the donee,
alleging subsequent payment to the donor of
other 300 livres, and, moreover, the want of
property in the donor except for half, pleaded
that of the other half, being the property of the
children, he had purchased out the rights of all
except two of them. He contended, therefore,
that the plaintiff's claim should be reduced to
half, and that he, the defendant, had already
paid more than the half. The Court thought
that the circumstances of the action were clearly
proved, and that Bedard had not only received
more than his share, but that he had no right to
transfer any part of the 1,500 livres considera-
tion money to the plaintiff. The judgment dis-
missing the action (at Vaudreuil) would there-
fore be confirmed.

CHARTRAND *et al. vs.* JOLY and WHITLOCK, T. S., and DESJARDINS *et al.*, intervening. BADGLEY, J.—This contestation arose out of the construction of a church. The plaintiffs, by *saisie-arrêt*, attached a quantity of planks and boards, &c., at the mills of the *tiers-saisi*, Whitlock. The defendant was the contractor for the erection of the church. The intervening parties were his sureties for the construction of the building. The defendant was to furnish all the materials, and the Syndic had simply to pay the price as stipulated in the contract. But the sureties stipulated that the price to be paid by the Syndic was to be paid to them, and that all the materials on the premises should be held for them. Consequently they not only controlled the price, but everything that was put upon the premises. The defendant caused part of the timber to be put on the premises, and this was not in controversy at all. The rest of the timber was taken to Whitlock's sawmill, where it was laid down. It was certain that this timber was never upon the church premises, and never came into the possession of the sureties at all. This timber was seized. The question then was, had the sureties acquired this sawed timber, and was it in their possession? The proof was clear that the defendant purchased the timber from one McCabe, and transferred it to Whitlock. Moreover that he was sued by Whitlock himself, and confessed judgment to Whitlock for

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under a *capias*, on account of his intention to leave the Province, and because he was said to be disposing of and making away with his effects. The petitioner denied the allegations of the plaintiff, and came up in the usual way with an application for quashing the writ. Some testimony had been adduced as to his intention leave the Province, and dispose of his effects. re were contradictions in this testimony. f the witnesses said she went to defendant's and there saw that his carpets, furniture, been taken away. The plaintiff wished e evidence in rebuttal of this fact, but revented by a ruling at *enquête*. The vising this decision must be granted, on reversed, because the evidence ld have been allowed.

JME and DUCHESNAY, *Tiers* ismissing the contestation he garnishee, with costs ntestating party.

IRE AND LIFE INSUR-
red upon defendant's
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Writ allowed.
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collocawas paid cash. The British American reject-Company were then, and had been for ed by than ten years, the proprietors in possession cted. the land, and the plaintiff never had possession of it. That the sale of the land for taxes in February, 1860, was illegal, no taxes having been due; the Land Company having paid all the taxes to the Secretary of the Municipal Council of Windsor and Stoke, and the proceedings of sale to plaintiff were null. Further, that the plaintiff's deed was executed before the time allowed by law, inasmuch as it was granted before the expiration of two years from the date of sale for taxes, contrary to the provisions of the Statute. To this plea the plaintiff demurred on the following grounds:—First, that the validity of the deed of the Secretary-Treasurer, upon which the action was founded, could not be legally tested in the present suit in which neither the Corporation of the County of Richmond, nor of the Township of Windsor and Stoke are parties. Second, that by the Common and Statute Law of the Province the plaintiff could not be dispossessed of the lot of land in question, nor could his title thereto be annulled, till after the judgment of a competent tribunal (pronounced against the Municipality, the Secretary-Treasurer of which received or was entitled to the purchase money), ordering such Municipality to repay the sum, either with or without damages, or declaring the same null and void. Third, that no such action was ever instituted, or was alleged to have been instituted against the said Municipality. This demurrer was maintained in the Court below. The de-

fendant contended that it was erroneous on the following grounds:—First, because the subsection of the statute cited above had no application to the present case. It simply defined the mode of proceeding which would be adopted by a person whose property had been illegally sold for taxes, where the purchaser had got actual possession and the owner had been dispossessed. The choice of actions did not rest with the defendant. He clearly had a right to defend himself, to dispute the title of the plaintiff, and to show that he, defendant, held the land under a good title. Second, because on its face the plaintiff's deed was null, and the defendant had a right to plead such nullity. Third, because the defendant's plea was a legal and valid defence to the plaintiff's action, and defendant had a right to show that the deed granted by the Secretary-Treasurer was null. His Honor thought the judgment should be reversed. The Secretary-Treasurer had a right to transfer only the expectancy of the land after the two years had elapsed. Con. Stat. L. C., Chap. 24, Sec. 61, Subsection 6, enacted that the owner might redeem within two years, on paying the price and 20 per cent more. Judgment reversed and proof ordered.

MONK, J., said the demurrer was quite untenable. If the parties had gone to *enquête*, and the defendant proved his plea, there would be no difficulty as to the fate of the action. The Court should have ordered proof.

MOLLEUR, *fils vs.* FAVREAU.—BADGLEY, J.—In this case, which was in ejectment upon a verbal lease, the Court was of opinion that the *motif* of the judgment could not be sustained. The *motif* was that the plaintiff had made no legal proof of a *mise en demeure*. The question was as to occupation of a farm under a verbal agreement, and whether at the expiration of the year the defendant had sufficient notice to leave and quit the property. The judgment was grounded upon the *motif* that there was no *mise en demeure*. Now, the Court of Review was of opinion that the notice was sufficient. It was proved that a verbal notice was given, and that fact was admitted by the defendant.—The judgment must be reversed.

DUBORD *dit* LAFONTAINE *vs.* COUTU.—BADGLEY, J.—This was an action on a promissory note by the payee against the maker. Defendant pleaded that the note was got from him by surprise and fraud; and he tried to throw the liability on a brother-in-law of the plaintiff. It appeared manifest that plaintiff was too well acquainted with his relative's credit to have anything to do with him, and therefore he would only have to do with defendant.—The judgment of the Court below must be confirmed with costs.

GIARD *vs.* GIARD.—BADGLEY, J.—The only question in this case was with reference to a promissory note, and whether that was the same as the note mentioned in the proceedings. The judgment of the Court below must be confirmed.

CORDNER *vs.* MITCHELL.

Plaintiff leased a house, with a clause prohibiting sub-letting without his express consent in writing. Held, that the verbal consent of plaintiff's agent to a sub-lease, and the plaintiff's acquiescence in such sub-lease, during its entire term, were equivalent to a consent in writing.

BADGLEY, J.—This was an action to resiliate a lease for three years from plaintiff to defendant. Mr Tuggey acted as agent for the leasing of plaintiff's house, and held a power of attorney to transact all business with respect to the house. Defendant leased the house under a notarial lease which prohibited sub-letting, unless with the written consent of the proprietor. Defendant on giving notice was to have the privilege of keeping the house for two years more. On the 3rd February, 1863, the defendant sub-let the house to Dr. David for the remaining term of two years, taking security for the rent, and paying Mr. Tuggey $10 as his commission for obtaining a sub-tenant. The agreement was between Messrs. Mitchell and David. All that Mr. Tuggey had to do with it was putting an advertisement in the papers and receiving his $10. Dr. David entered into and continued in possession for two years. In February, 1865, the defendant gave plaintiff notice of his intention to continue the lease for two years more. This alarmed the plaintiff, who did not wish to allow a professional man to continue in the house, and the present proceedings were instituted to have the lease resiliated. During the two years that Dr. David remained in the house Mr. Tuggey, as the plaintiff's agent, received the rent from him, the receipts being worded, "on account of Mr. Mitchell." The plaintiff was aware of this fact, and certain letters from him were produced in connection with the fact. Being brought up as a witness, he admitted that he was aware of the fact that the house was occupied by Dr. David in 1863, and that he expressed neither approval nor disapproval, not wishing to cause any trouble. The Court below resiliated the lease on the ground that there was *no sufficient evidence that the plaintiff acquiesced either directly or indirectly in the sub-lease.* The majority of the Court of Review were of opinion *there was acquiescence on the part of the plaintiff*, hence the judgment must be reversed.

MONK, J., had come to the conclusion that the judgment should be reversed, with very great hesitation. Here was a gentleman who leased a first-class house, and took the precaution to insert a clause (not necessarily connected with the lease,) that the house should not be sublet without his express consent in writing. It was a principle of law that in cases of this description the lease must be adhered to. But plaintiff had an agent who transacted all his business. This agent had a general authority, and although it might be said that for the purpose of granting a consent there should be an express authority to the agent, yet it was perfectly plain that the plaintiff knew what was going on. Instead of giving a semi-acquiescence, he should have told his agent at once, there is a clause in the lease which forbids subletting without my express consent, and I will

not consent. He did not do this. Two years went by, and on the 3rd February an action was brought. Taking all the circumstances together, the Court must consider them as equivalent to an express consent, and that this express consent was equivalent to one in writing.

Mr. Justice Berthelot, who rendered the judgment in the Court below, dissented.—Judgment reversed.

LANGELIER *vs.* MCCORKILL.—BADGLEY, J.—This was an action for a part of the purchase money of a piece of land. The defendant pleaded that he was not liable The judgment must be revised by dismissing the action, recourse reserved to plaintiff

BEAUDET *vs.* MCCORKILL and ETHIER, intervening party—

Held—When a *demande* in intervention has been allowed by the Court, it must be served on the proper parties and return made within three days, otherwise it becomes null *ipso facto*. C. S. L. C. cap. 83, sec. 71.

BADGLEY, J.—This was a proceeding upon an intervention. No intervention was filed at the time the application was made. A motion was made to enable Ethier to file an intervention. The motion was received. Three days expired, and no return was fyled according to the Statute. No notice was given to the other parties, and, by law, the expiration of the three days rendered the intervention *ipso facto* null and void. The intervening party after that made application to be allowed to fyle his *moyens* of intervention. The judgment granted further delay, and it was upon the judgment on this motion that the revision had been applied for. The Statute seemed to be clear enough upon this point. The law said that a demand in intervention being fyled, a party may move for its allowance. After it has been allowed by the Court on motion, if it is not served on the proper parties and return of service made within three days, then the demand in intervention becomes null *ipso facto*. This objection was fatal; hence the judgment must be overruled.

SUPERIOR COURT.—JUDGMENTS.

MONTREAL, May 31, 1865.

BADGLEY, J.

LOCKHEAD *vs.* GRANT.—In this case a rehearing had been ordered. Owing to some misunderstanding apparently, a notice had been fyled for revision of the judgment. Now there was no judgment to revise, as it had not been recorded, owing to an error on a point of fact. The action was on a farm lease for six years, with power to cancel it at any time after six months' notice, when the landlord was to take at a valuation the drawn manure in excess of usual quantity left by outgoing tenants. The notice was given by the defendant, the landlord, and the plaintiff sued to recover the value of the manure in excess. The Court now rendered judgment in plaintiff's favor for £78.

MILLER *et al. vs.* DUTTON, and DUTTON, Petitioner.—The plaintiffs arrested the defendant under a *capias*, on account of his intention to leave the Province, and because he was said to be disposing of and making away with his effects. The petitioner denied the allegations of the plaintiff, and came up in the usual way with an application for quashing the writ. Some testimony had been adduced as to his intention to leave the Province, and dispose of his effects. There were contradictions in this testimony. One of the witnesses said she went to defendant's house, and there saw that his carpets, furniture, &c., had been taken away. The plaintiff wished to produce evidence in rebuttal of this fact, but had been prevented by a ruling at *enquête*. The motion for revising this decision must be granted, and the decision reversed, because the evidence in rebuttal should have been allowed.

BERTHELOT, J.

IRELAND *vs.* MAUME and DUCHESNAY, *Tiers Saisi*.—Judgment dismissing the contestation of the declaration of the garnishee, with costs against plaintiff, the contesting party.

TABB *vs.* LANCASHIRE FIRE AND LIFE INSURANCE CO.—Judgment entered upon defendant's motion, on the verdict of the Jury, and action dismissed.

Ex parte PELTIER, for *certiorari*.—Writ allowed.

Ex parte MORIN, for *certiorari*.—Writ allowed.

GILLESPIE *vs.* SPRAGG.—A motion was made in this case, that the contestation of the collocation of Mr. Dorwin by Mr. Lavicount, be rejected from the record, the intervention fyled by Mr. Lavicount having been previously rejected. Motion granted and judgment of distribution confirmed.

MONK, J.

QUINN *vs* EDSON.—This was an action for rent. Thinking his rights jeopardized, the plaintiff took out a *saisie-arrêt*, on the ground that the plaintiff was secreting his estate, debts and effects. The foundation for this belief was that the defendant had advertised his moveable property for sale. Defendant answered, true, but that shows no fraud. He said that he was in community with the members of his family, and an inventory was taken. It was true that this inventory was taken at a rather suspicious time, but the Court had nothing to do with that. It might have suited his convenience to take the inventory at that time. It was also a little singular that the defendant did not advertise the sale at Longue Pointe, where the plaintiff, a creditor, was supposed to have lived. But these two circumstances were not sufficient to justify the Court in saying that anything had been proved to sustain the plaintiff's allegations, and the *saisie-arrêt* must be quashed, with costs.

WRAGG *vs.* RITCHIE.—This was an action for the recovery of rent. The defence was that the house had been leased by the defendant to be used as a house of prostitution; that plaintiff was aware of this; and therefore he could not in law recover. The defense endeavored to prove plaintiff's knowledge by establishing

that he had visited the premises; that the defendant's wife told him it was necessary to have twelve bedrooms, and that this must have made plaintiff aware of the real state of the case. But he replied that he supposed the house was to be used as a hotel. There was nothing to show positively that plaintiff was aware of the use to which the premises were to be applied, and whatever surmises might exist, they could not be entertained by the Court. Judgment would go for $390, nine months' rent.

CROWLEY *vs.* DICKINSON.—This was an action brought by the plaintiff, Crowley, against the defendant, a forwarder, to recover the sum of $2,200, for the use of certain barges, and also for damages to the same. The statement of the plaintiff included a number of allegations respecting the barges and the various accidents which befel them. On the 18th of June, 1863, the defendant acting by Ross, his agent, leased from the plaintiff a barge lying in the canal basin, at the rate of $3 per day. The plaintiff said that subsequently the barge was run upon the rocks at the Chute, near Chatham, on the Ottawa River. The barge, which at the time was loaded with wood, was much injured, and the defendant sent her to Lachine, where she was abandoned. In the Spring she was unloaded, and abandoned again. On the 15th of August, 1863, the defendant hired another barge, the *Hope*, at $6 per day. She also met with an accident while running the rapids, and sank. It was contended on the part of the defendant that there was no want of care; that the barges were old and unfit for the service. The evidence was conflicting to a degree rarely parallelled, and the Court found great difficulty in coming to a decision. Taking all the circumstances into consideration, it would award £50 to plaintiff.

WENHAM *vs.* THE BANQUE DU PEUPLE.—His Honor was about to give judgment in the above case, when Hon. Mr. Dorion, of counsel for the defendants, rose and said that they had come upon the traces of the man who presented the cheque. The defendants had been informed the previous day that he had been seen in town. He therefore suggested that the judgment should be postponed in the expectation of procuring further evidence.

Mr. A. Robertson, on behalf of the plaintiff, opposed the granting of any delay.

His Honor said that the application being opposed, the Court must proceed to render judgment.

The action was brought to recover about $1,500, the amount of a cheque which the plaintiff had drawn upon the People's Bank, and which that Institution had refused to pay on the ground that there were no funds to meet the same. The case was a very singular one. In November last, the plaintiff had a deposit at the Bank of over $1,500. Nearly the whole of the amount was drawn out on a cheque purporting to be signed by the plaintiff and endorsed by Mr. Simpson (his associate.) At this time, the plaintiff had deposits with four different Banks, and on the same day all these deposits, within a small fraction of their respective amounts, were drawn out by similar checks purporting to be signed by the plaintiff and Mr. Simpson. The plaintiff denied that the signature was genuine, and the present action was brought to test the matter. The singularity of the case was that it was almost impossible for any man to say that the signatures were not genuine. The imitation was so perfect with respect to Mr. Wenham's, that his Honor could not see any difference at all except that the writing of the forged one was a little stronger. Mr. Wenham and Mr. Simpson had been examined, and they both swore positively that they never signed the cheques. It was a very singular circumstance that the man who drew the four checks must have had a very intimate knowledge of the state of Mr. Wenham's account with four different banks, because he drew within a trifle of the amount at each bank. It could not have been done by any person in the employ of any one of the banks, for he could not have ascertained the state of the plaintiff's account with the other three. The Court had to fall back upon the supposition that it must have been done by some one who had access to Mr. Wenham's bank books. The case altogether was exceedingly strange, and might be susceptible of a great deal of curious speculation. But the Court would not enter into any speculations on the subject. It would simply pronounce that the signature of the cheque paid was a forgery, and the defendants would be condemned to pay the amount now demanded by the plaintiff.

DEVALTAMIER *vs.* MCCREADY *et al.*

D. used insulting and exasperating language to McC., and attempted to pull him from the waggon in which he was seated. McC., having then committed a violent assault on D, held, that the provocation did not justify the violence, and $100 damages awarded.

This was an action of damages against Councillors McCready and Homier for violent assault on the plaintiff, the gardener of Viger Square. It appeared that on 15th August, 1863, Mr. Homier was overtaken in Notre Dame street by Mr. McCready, who asked him to take a drive. They arrived at one of the gates of Viger Square, where the plaintiff came out of the garden and politely welcomed them. Mr. Homier introduced Mr. McCready as one of the City Fathers. Some remarks were made as to flowers, when Mr. McCready said rather disparagingly that the plaintiff had nothing but sunflowers in his garden, and that he, Mr. McCready, had better himself at home. The gardener thereupon became very much exasperated—in fact, almost furious. There was nothing in the conduct of Mr. McCready to justify the gardener's furious language, however his professional pride might have been hurt. Mr. Homier endeavored to pacify them, but in vain. The plaintiff took Mr. McCready by the collar. It is not very clear what Mr. McCready was doing at the time. He seemed to have been in rather a passive state. The plaintiff challenged him to fight, and seized him by the collar to drag him out of the carriage for

this purpose. So far it was perfectly clear that the plaintiff was the assailant. Now, however, Mr. McCready becoming exasperated seized his whip and struck the plaintiff with the butt, inflicting severe injuries. He then drove off. The wounds, though extremely serious, were not dangerous, and the plaintiff recovered. He proceeded to have Messrs. McCready and Homier arrested and indicted. The Grand Jury threw out the bill against Mr. Homier. Mr. McCready was indicted, but acquitted by the Petit Jury. Subsequently to the criminal proceedings the plaintiff brought the present action for damages against both. Now Mr. Homier seemed to have acted very properly throughout the whole affair. It was impossible to attach the slightest blame to him. The action against Mr. Homier was perfectly unjustifiable and would therefore be dismissed. With respect to Mr. McCready, the Court could easily understand that the language of the plaintiff must have been exasperating, and if Mr. McCready had struck the plaintiff with the lash of his whip merely, there might have been nothing to say. But he resisted the assault in an unjustifiable and violent manner. He exceeded the measure of resistance which the occasion called for, and the Court must therefore award the plaintiff some damages. Under the circumstances, it was impossible to award less than $100 damages, with costs as of an action of the lowest class in the Superior Court.

CIRCUIT COURT.

MAILLET *vs.* DESILETS.

An action of damages for injurious language. The parties, shoemakers, had been in the habit of abusing each other. Ten dollars only awarded.

BADGLEY, J.—

This was an action for $200 damages brought by a shoemaker against a brother shoemaker, for injurious language. It appeared that Maillet had employed the defendant for nine or ten years back. On one occasion, the 26th February, 1864, the defendant took some work to the plaintiff's store on Jacques Cartier Square. The plaintiff refused to receive it, saying it was not properly done. The defendant said he would do it over again. One word led to another, and the defendant called Maillet a thief. It appeared that this was the sort of language ordinarily used between them. They always called each other *voleur*. It was all leather and abuse between them. But on this occasion there was unfortunately a witness present who was the busybody who made all the mischief. This man said to plaintiff, "You are not going to let him use you thus?" The plaintiff set out these facts in his declaration, stating that he had always borne an honest and irreproachable reputation, and stood high in the esteem of all who knew him. The defendant made answer that they were in the habit of joking with each other while regulating their accounts. That on the occasion referred to, the plaintiff refused to pay him for 25 pairs of shoes. Defendant, laughing, answered: "*C'est bien, M. Maillet, vous ne voulez pas me payer; et bien! vous ne pouvez pas faire vos Paques avec ces 25 paires de chaussures; car en me faisant perdre tout cet ouvrage et mon cuir, ce n'est pas bien.*" The defendant farther asserted that then the plaintiff, in a furious tone, replied, "*Desilets, écoute; il y a long temps que tu devrais le savoir, mais c'est moi qui te l'apprends. Sache que tous ceux qui entrent chez toi pour y apprendre le métier de cordonnier finissent toujours par être des sacres voleurs comme tu en es un toi-même.*" Thus had they amused themselves for ten years back But the only question for the Court now was, Did Desilets apply the term thief to plaintiff? There was no doubt that he did. Had he any provocation? There was no doubt that he had. But all the witnesses concurred in saying that Maillet never sank in their estimation on this account. Under these circumstances judgment would go for plaintiff for only $10 damages.

COURT OF QUEEN'S BENCH—APPEAL SIDE—JUDGMENTS.

PRESENT: Chief Justice Duval; Justices Aylwin, Meredith, Drummond and Mondelet.

Montreal, June 6th, 1865.

HON. JUDGE LAFONTAINE, (Defendant in the Court below), Appellant; and CUSSON, (Plaintiff below), Respondent.—

An action for the price of a carriage sold and delivered.—A question of evidence only.

DUVAL, Ch. J.—

This is an action brought by a carriage maker of Montreal, against the defendant, a Judge residing in Ottawa, for the sum of £80, the price of a covered four-wheeled carriage, sold and delivered to him in June, 1860. At the time the carriage was sold at the plaintiff's place of business in Montreal, the last coat of varnish had not been put on, and it was argued that this should be done, and then the carriage was to be shipped to Ottawa. The plea was that the carriage which was delivered to the defendant had been made in an unworkmanlike manner; that the painting, varnishing and the stuffing were so inferior, and had been done in such a slovenly manner, that it is was quite impossible for the defendant to accept the carriage, which he accordingly sent back to Montreal, where it was put into one of Dickinson's sheds. This is altogether a question of evidence. No question of law comes up. The Court has, therefore, only to determine whether the carriage delivered to defendant was the carriage which he purchased, or whether it was another carriage. The judges are all decidedly of opinion that it was the same carriage. The defendant saw this carriage in the shop of the carriage-maker when it was almost completed. It had to get another coat of varnish and the wheels had to be put on. As defendant wished to see how it would look with the wheels on, the carriage-maker told him he had sold one precisely similar to a carter

in Montreal called St. John, and that he might examine that, and, if he liked it, have his own finished off precisely similarly. Defendant went down to see this carriage, and, in fact, rode in it twice, and was quite satisfied with it. Now, it is proved that, if anything, the carriage delivered to defendant was, in painting and varnishing, superior to that sold St. John, with which to defendant was satisfied. What is the objection now made? It is that it was not such a carriage as should be delivered to a person in the position of the defendant. Now, if the defendant had made his bargain without seeing the carriage, he might have some grounds for making this objection. But having seen the carriage, and having thought proper to take it at a price (£80) which the witnesses said was a price less than that charged St. John, the defendant with *pleine connaissance* made the purchase. It appeared to have been first suggested to him by Mr. Aumond of Ottawa, who, after examining the carriage, said that it would never do for a Judge. It may be that the defendant should have purchased a superior one, but that is entirely a matter of taste. The judgment of Mr. Justice Monk, in the Superior Court, maintaining the plaintiff's action, must be confirmed.

DRUMMOND, J., concurring, said: I have much respect for the opinion of Mr. Aumond, and cannot but allow it much weight. But the evidence on the other side is too strong. Besides the defendant should have sent back the carriage at once, instead of allowing it to remain in a place where it received great injury. Eighty pounds was a low price for which to expect to get a first-class carriage, though it does seem rather singular that an £80 carriage should be stuffed with hay.

Judgment confirmed unanimously.

R. & G. Laflamme, for Appellant; Leblanc & Cassidy, for Respondent.

MAHONEY (Defendant in Court below), Appellant; and HOWLEY *et al.* (Plaintiffs below), Respondents.—DUVAL, Ch. J.—This was an hypothecary action upon an obligation for £150 brought by Bridget Howley, widow of Michael Howley, and tutrix to her minor children. Want of consideration had been set up. The widow was the only witness examined in the case. Her admissions or statements, it was contended by the defendant, proved that the original consideration money was only £40, instead of £150, as alleged in the deed. It was evident that the widow could not by parol testimony destroy the obligation to the prejudice of the interests of the minors. The evidence of the widow, moreover, was not conclusive. She spoke only of what took place subsequent to, and not of what occurred at the time of the obligation. It was a question how far the widow, tutrix, could bind her minors. Her deposition was no more than the deposition of an ordinary witness. If not conclusive it would not bind the minors. The tutrix binds her minors for the affairs of her administration, but the widow, plaintiff in this case, by no means spoke in that conclusive manner which would justify the Court in reversing the judgment of the Court below, which held that the admissions of the widow (as to the original consideration being only £40), could not avail in law against the children.—Judgment confirmed unanimously.

R. & G. Laflamme for appellant; B. Devlin for respondents.

FLECK (Plaintiff in the Court below) Appellant; and BROWN (intervening party below Respondent.—DUVAL, Ch. J.—This was an appeal from a judgment of the Superior Court quashing a seizure, corporeally made by the Sheriff, of a quantity of railroad iron, *in the hands of a third party*, under an ordinary writ of *saisie-arrêt* after judgment. Respondent, who claimed to be the owner of the iron, intervened, and moved, inasmuch as a corporeal seizure of the iron in the hands of the third party was illegal (the exigency of the writ being fulfilled by the service of the writ on such third party), that the seizure be quashed. Appellant answered that according to the Sheriff's return, the iron was seized in the *possession of the defendants*, and until that return was got rid of, the Court was without evidence that the iron was seized in the hands of a third party. His Honor said the Sheriff's proceedings were extraordinary, but the intervening party had been premature. At the time he made his motion there was no issue joined. The Court had no evidence to show that the property really belonged to Mr. Brown. The judgment must therefore be reversed.—Judgment reversed unanimously.

Cross & Lunn for Appellant; S. Bethune, Q. C., for Respondent.

BARRE (one of the defendants in the Court below), Appellant; and DUNNING (Plaintiff in the Court below), Respondent.—The appellant in this case was the endorser of a note, and the appeal was from a judgment of the Circuit Court condemning him, jointly and severally with the maker of the note, to pay respondent $142, amount of the note. The plea of the endorser was that part had been paid, and the balance was tendered with this plea.

DUVAL, Ch. J., dissenting, thought the judgment should be reversed. It was purely a question of evidence, and he thought the weight of evidence was in favor of the appellant.

DRUMMOND, J., also dissenting, said the question of imputation of payments also came up. The money paid by the defendant should have been imputed on the most onerous debt, viz., the note in question, instead of on certain other notes held by the payee. The judgment should be reversed on this ground apart from the evidence.

MEREDITH, J., held the law to be this:—Where the debtor does not indicate how the payments are to be applied, the creditor may impute them on whichever debt he prefers. Besides, the defendant had failed to produce certain evidence which he had an opportunity of doing. He thought the preponderance of evidence in favor of the judgment. Moreover, upon doubtful questions of fact, when according to his view, the evidence was evenly, or very nearly evenly balanced, he was disposed to re-

verse. Judgment confirmed. Duval, C. J., and Drummond, J., dissenting.

Perkins & Stephens for Appellant; Leblanc & Cassidy for Respondent.

BROUGH (plaintiff contesting opposition in Court below), Appellant; and MCDONELL (opposant below), Respondent.—DUVAL, C. J.—This was an opposition on the part of Respondent, claiming the moveables seized in the cause. The bailiff had made an improper return, that the money had been paid, whereas no money had been paid. The contestation of the opposition (which opposition was founded upon a fraudulent confession of judgment given by one brother to another) must be maintained. —Judgment reversed unanimously.

Aylen & Perkins for Appellant; J. Delisle for Respondent.

COUPAL (defendant in the Court below), Appellant; and BONNEAU (plaintiff in the Court below), Respondent.

Excessive damages for seduction reduced. £100 only allowed, plaintiff to pay costs in appeal.

DRUMMOND, J.—

This was an action *en déclaration de paternite,* instituted by Suzanne Bonneau on the 9th April, 1862. The plaintiff was a minor at the time the action was instituted, but having attained her majority while the action was pending, the *instance* was taken up in her name. The plaintiff set up that she was chaste and was generally esteemed up to the time her fault became known. That defendant, for two years before she yielded, visited the plaintiff as a lover, and continually promised her marriage. On the 16th April, 1861, a child was born. Plaintiff claimed $8,000 damages. The Court below awarded $2,000 damages,—$60 per annum till the child should attain the age of 7, and $120 per annum from 7 to 14, with interest. His Honor had been much surprised at the amount awarded. The affair which led to the action was unfortunately not very uncommon in the country, and though the plaintiff's family was no doubt highly respectable, yet his Honor could not but regard the damages as excessive for persons in their position in life. The sum was quite a fortune in the country, the £30 per annum allowed to the child from 7 to 14 being almost sufficient to support a large family. The child, however, had died since the judgment of the Court below, and the Court would not disturb this part of the judgment. But the amount of damages would be reduced to £100, and the plaintiff would be condemned to pay the costs in the Court of Appeal.

AYLWIN, J.—The declaration of the Respondent shews that this unfortunate girl had indulged in her illicit intercourse as long as she could without producing the natural results. With such *libertinage,* I should have been of opinion to award her no damages, leaving vice to be its own reward. The condemnation of costs, however, would be a reward on the side of the debauched young man, the Appellant, unless it were repressed by a mulct. I hope that such exorbitant verdicts will be checked by the reversal, *omni voce,* of this extravagant judgment of the Superior Court. It is a sad thing that with our legislation, erring females have power to imprison their debtors, upon action of breach of promise of marriage or seduction, while honest women are left to get their damages as best they can, and the honest wife is left without redress against a rascally husband. It is a scandal to our legislation.—Judgment modified, damages $400, with costs of Court of Appeal against Respondent.

Doutre & Doutre for Appellant; Mag. Lanctot for Respondent.

LACROIX (plaintiff in the Court below), Appellant; and MOREAU (defendant *en garantie* below), Respondent.—AYLWIN, J.—In this case I dissent from the judgment about to be rendered by the Court. I shall only say I am of opinion that the judgment of the Superior Court is wrong, and that the pleas of the Appellant should be maintained; that the fraud set up is sufficient to annul the *décret* pleaded by the Respondent; and that the pleas of prescription, and the pleas of *impenses et améliorations* of the Respondent are sufficiently answered again by the fraud proved by the Appellant.

MONDELET, J.—This was a petitory action claiming a lot of land occupied by defendant. The controversy was as to the sufficiency of the special answers fyled by the Appellant rejected in part by the Court below. His Honor was of opinion that the judgment should be confirmed.

Judgment confirmed, Mr. Justice Aylwin dissenting.

E. Barnard for Appellant; Leblanc & Cassidy for Respondent.

WATSON (plaintiff in the Court below), Appellant); and SPINELLI (defendant and plaintiff *en garantie* in Court below), Respondent; and FULLUM (defendant *en garantie*), Respondent.

F. wished to buy a small strip of land, of little value to any one but himself, and offered £15 for it. The price asked by W. was £20, which F. refused to pay. Afterwards F. sold this land to S., who built on it. A petitory action being brought, it was held that F. must pay the £20 asked for the land, and costs of both courts.

DRUMMOND, J., said the Court would have shrunk from the decision to which it had come in this case if it had not found precedents to justify it. It was one of the cases where *summum jus* would be *summa injuria.* The circumstances were these. The Corporation had acquired a lot of land for the purpose of opening Craig street, and having taken as much as they required, the remainder (a small strip only six feet wide at one end and terminating in a point at the other end) was sold, and Watson became the purchaser. It was about the possession of this strip of land that the difficulty occurred. This strip of land could be of no use to any one but Fullum, whose land it adjoined. The purchaser, Watson, being absent from the city, Fullum went to his brother and offered him £15 for the strip of land. Watson declined to sell at that price, but said he would sell for £20 or £25. Fullum would not accept this offer; but some time afterwards, probably relying on Watson's absence, and thinking he would oust

him from this strip of land, he sold land to Spinelli, giving him a front covering Watson's strip. When Watson returned he instituted the present petitory action against Spinelli, who in turn sued Fullum *en garantie*. The judgment of the Superior Court ordered the defendant *en garantie* to pay £20 for the land, which then would become his. The Court of Appeals did not agree with the reasons of this judgment, though they considered the *dispositif* good. It would do no one any good to order the demolition of the buildings, and, therefore, the Court thought proper to exercise a rather unusual power in dealing with the case, so as not to interfere uselessly with the interests of the parties. The Respondent, Fullum, would have to pay £20, with costs in both Courts.—Judgment reformed. Justices Duval and Aylwin dissenting as to costs.

Day & Day for Appellant; T. S. Judah for Respondent.

McFAUL (defendant below), Appellant; and McFAUL (plaintiff below), Respondent.—DRUMMOND, J.—This was an extraordinary case. The parties had made an amicable settlement some years ago, while their counsel were still proceeding with the case in Court. The appeal was from a judgment of the Circuit Court at Aylmer, on a motion for the appointment of a surveyor to determine the line *de novo*. The judgment was based upon the fact that since the institution of the action, a *bornage* had been made between the properties.—Judgment confirmed unanimously.

J. Colman for Appellant; Aylen & Perkins for Respondent.

QUINTIN (plaintiff), Appellant; and BUTTERFIELD (defendant), Respondent—DUVAL, C. J.—The judgment in this case must be confirmed. Defendant had reason to fear that he might be troubled in his possession of a property sold him by one Lafrenière, a mortgage being held on the property by a man named Beauregard, and therefore he had a right to withhold payment of part of the purchase money which Quintin claimed as the *cessionaire* of Lafrenière, though Butterfield had accepted notice of the transfer. Lafrenière could not confer on plaintiff any rights against the defendant which he, Lafrenière, did not possess.

Judgment confirmed unanimously.

Doutre & Doutre for Appellant; Leblanc, Cassidy & Leblanc for Respondent.

DUPLESSIS (defendant below), Appellant; and DUFAUX (plaintiff below), Respondent—This was a case arising out of the sale of a quantity of brick, and the only point was a question of evidence as to whether one Pelloquin acted as agent of the plaintiff in the sale, or whether he was the proprietor.—Judgment reversed, Duval and Meredith, JJ., dissenting.

Lesage & Jetté for Appellant; D. Girouard for Respondent.

BOWKER AND FENN.—DUVAL, C. J., said as this was a case of importance, in which the Court was called upon, for the first time, to put an interpretation upon a part of the Promissory Note Act, it would have to stand over to next term.

FOLEY (defendant below), Appellant; and GODFREY (plaintiff below), Respondent.—DUVAL, C. J.—This was a hypothecary action, and judgment was obtained *ex parte* by the plaintiff. There were two objections raised to the judgment by defendant. First, that the certificate of registration was not upon the copy of the deed, but was a distinct and separate paper. The Court did not think it necessary that it should be upon the deed. Second, that the interrogatories had not been properly drawn. The Court thought they were sufficient.—Judgment confirmed unanimously.

A. & W. Robertson for Appellant; C. Bedwell for Respondent.

BUNTIN (defendant below), Appellant; and HIBBARD (plaintiff below), Respondent.

Held,—That, under the circumstances stated, the defendant used due diligence in tendering back the goods found not to correspond to sample.

This was an action to recover the balance due on the price of a quantity of rags sold by the plaintiff to the defendant. On the 16th May, 1863, the Appellant purchased from Respondent 86 bales of cotton and linen rags at 5¼ cents per pound, deliverable in Montreal, and payable $1200 in cash when part of the bales were delivered, and the balance at a subsequent date. The sale was according to two samples of rags deposited with defendant. At the time of the delivery, the defendant was at his paper mills at Valleyfield, and the reception of the goods was conducted by one of his clerks. Fourteen of the bales were found to be damaged by salt water, and an understanding was come to between defendant's bookkeeper and the plaintiff that these 14 bales should be shipped to Valleyfield with the rest, and the damage by water be subsequently adjusted by the clerks who had seen them. When the bales arrived at the mills and were opened, the defendant pronounced them inferior to the samples, and he ordered his foreman not to use them, but to keep them till he (defendant) brought up the samples and compared them with the contents of the bales. The $1200 was paid by defendant's bookkeeper before defendant's return to Montreal. After his return, he complained verbally to the plaintiff that the quality of the rags was not according to sample, and they spoke of an arbitration to determine both the quality of the rags and the amount of damage. The survey not being carried out, the defendant tendered back the 86 bales, and demanded the $1200 which had been paid. The plaintiff took out an action for the balance, and the judgment of the Court below was rendered in his favor.

MONDELET, J., dissenting, thought the judgment should be confirmed.

MEREDITH, J., also dissenting, thought it was proved conclusively that the rags sold by the plaintiff were not of so good a quality as the sample, but the defendant should not have neglected to examine the bales at the Grand Trunk station. When they arrived at Valleyfield, he said at once they were not of the same

quality, but his samples were at Montreal, so that he could not compare them. When he arrived in Montreal he should have notified plaintiff at once that the rags were not of the same quality. This was the more necessary because the rags had been removed after a part of the sum had been paid on account. The law of the case was clear. If the appellant wished to return the rags, he should have returned them without delay. In his opinion the appellant had not used due diligence. The price of rags in the meantime went down to the extent of ten per cent. The judgment, he thought, should be confirmed.

DUVAL, C. J., said it was a question of responsibility, and not one of good or bad faith, because both parties were in good faith. But it was a sale according to sample. The rags were wet and inferior, and therefore the vendee had a right to reject them. The only question was this, did the vendee use due diligence in notifying plaintiff? His honor thought he did. The delay took place by the consent of the parties, who were proposing an arbitration. The observance of the Queen's Birth-Day also interfered. Judgment reversed, Meredith, J. and Mondelet, J. dissenting.

S. Bethune, Q. C., for Appellant; A. & W. Robertson, for Respondent.

LAVOIE (defendant below), Appellant; and GAGNON, (plaintiff below) Respondent. — The question in this case was whether an amount of 768 livres, amount of a transfer dated some twelve years back, had been included in an obligation subsequently given, and which had been paid. The decision of this question depended upon the further question — whether there was a *commencement de preuve par écrit*, so as to render parol evidence admissible. The Court below, although admitting that there were strong grounds for believing that the money had been paid, was yet of opinion, that there was no *commencement de preuve par écrit*, and, rejecting the parol testimony of payment, condemned the defendant to pay the amount.

MEREDITH, J., said there was a *commencement de preuve par écrit* in the receipt signed by the plaintiff himself, and that the parol evidence based on that receipt, in the opinion of the Court, fully established the pretensions of the appellant.

Judgment reversed, Mondelet, J., dissenting.

D. Girouard for Appellant; A. & W. Robertson for respondent. [In another case between the same parties judgment also reversed]

FALLON (defendant below), Appellant; and SMITH, (plaintiff below), Respondent. — The action was brought in the Court below for $100, the price of a combined Mowing and Reaping Machine. The plea was that the machine was only taken on trial, to be kept only in case it should prove a perfect instrument in every respect, and that on trial the machine was found unsuitable. Defendant notified plaintiff accordingly, and called upon him to take away the machine. The Circuit Court gave judgment in favor of plaintiff.

MONDELET, J., and MEREDITH, J., dissenting, were of opinion that the judgment should be confirmed. The reaping machines made by plaintiff were proved to be made on good principles. It was the duty of the defendant to give the machine a fair trial, and he refused to allow this to be done. All new machinery required a little time to settle into good working order.

DRUMMOND, J., said it required no scientific knowledge to see how a mowing machine worked. It appeared that this machine cut only a third of the hay. His honor thought the evidence was strongly in favor of the pretensions of the defendant. These machines were always sold with a guarantee. The action should have been dismissed.

DUVAL, C. J., said our rule of law was more favorable to the purchaser under such circumstances. We had a *garantie de droit* as well as a *garantie conventionnel*. And accordingly, every workman must guarantee his work, unless the purchaser takes all the responsibility upon himself. The defendant, who was an extensive farmer, gave the machine repeated trials. Why did not the plaintiff point out where the defect was?—Judgment reversed, Meredith, J., and Mondelet, J., dissenting.

Perkins & Stephens for Appellant; M. Doherty for Respondent.

MASSUE (defendant below), and DANSEREAU *et al.* (plaintiffs below), Respondents.—AYLWIN, J. dissenting.—The action on the part of the Respondent was *condictio indebiti*, and claimed the *repetition* of the sum of $540 unjustly taken by the Appellant and improperly paid by the Respondents, that is to say $193 on the 2nd July, 1856, $96 in July, 1856, $116 on the 5th July, 1857, $136 on the 9th March, 1859. By two obligations before Notaries, the Respondents were indebted to Mr. Aimé Massue, the father of the Appellant, in the sum of £800, payable with interest at the rate of 6 per cent. It is alleged that the Appellant was not authorized by Aimé Lafontaine, the father, to receive or take anything beyond the legal interest of 6 per cent. Respondents pretended the sum of $540 was excessive interest beyond the 6 per cent., as if it had been taken by the father; whereas in truth it was pocketed by the Appellant for his own benefit and without the knowledge of the other. The son acting throughout the whole transactions as attorney, he received in his own name the whole of the money, both principal and interest, together with the $540, the excessive interest.

The defendant pleaded an exception by which he alleges, "que c'est au défendeur en sa qualité de procureur du dit Aimé Massue que les dites obligations ont été payées ainsi que les intérêts sur icelles, mais qu' il est faux que le Défendeur se soit jamais fait payer en sa qualité de procureur du dit Aimé Massue aucune somme de deniers excédant l'intérêt à raison de 6 per cent. par an sur le montant des dites obligations."

This plea is bad upon the face of it. Firstly, it amounts to no more than the general issue, but besides it only states what the Respondents have stated in their declaration. Both the plaintiff and the defendant consent in stating "qu'il est faux que le Defendeur se soit jamais fait

payer en sa qualité de procureur du dit Aimé Massue aucune somme de deniers excédant l'intérêt à raison de 6 par cent. par an sur le montant des dites obligations." The allegation was that the Appellant falsely pretending to be the attorney, received from them, not for Aimé Massue, but for himself, the Appellant, a sum of money that was not due to him. That Appellant has not admitted the receipt of any money at all for himself, and has therefore not justified the taking. Examined upon oath, the Appellant has admitted that the sum of £96 over and above the legal interest then due and exigible on the amount referred to in the said declaration was received by him. The Appellant has said upon his oath: "Et en sus des intérêts cidessus, je reçus des demandeurs en l'année 1857, une somme de £48, et en l'année 1858 une somme de £24, lesquelles dites deux sommes me furent ainsi payées par les demandeurs à moi personellement, en considération des nouveaux délais que j'accordais aux demandeurs pour le paiement des dites obligations, et aussi de m'indemniser de mon trouble, frais de voyage et dépens." He has attempted an excuse by an "arrangement avec les demandeurs, ayant été entendu entre ces derniers et moi que si je pouvais rencontrer soit par billet ou autrement les engagements que j'avais contractés, ils les, demandeurs, me paieraient cette somme pour m'indemniser du percentage que j'avais moi-même à payer." But this attempt not being alleged it is not to be noticed, and therefore it is not proved. The Respondents properly speaking ought to have objected to the statements made by the Appellant, and there would have been nothing at all put upon the record; but although it has been taken in the deposition it must be rejected. To render a judgment in favour of the Appellant, it must be assigned as a reason that the arrangement has been proved. But there is no allegation to admit such proof; hence there being no allegation, and no proof of what ought to have been justified, the declaration is fully proved. The judgment contains a correct statement of the facts. It is as follows: The Court having heard the parties by their counsel upon the merits of this cause, examined the proceedings and proof of record, and having deliberated thereon, considering that the said plaintiffs have proved and established that the said defendant did exact and receive from the said plaintiffs, while acting for and on behalf of the said Aimé Massue, the father of the said defendant, in transacting the business of his said father in relation to the obligations referred to in the declaration, the sum of £96 over and above the legal interest then due and exigible on the amount referred to in the said declaration, and for which the said plaintiffs received no value whatever, or any consideration given; and considering that the said defendant applied the said sum of £96 to his own use, and which is admitted by the said defendant in his deposition as witness in this cause, the Court doth condemn the said defendant to pay to the said plaintiffs the sum of £96, with interest from the 12th of August, 1862. It might have been added as a *considérant* that the defendant having denied the fact of payment, and not having pleaded in avoidance, no evidence adduced by him was admissible as not being alleged, and that having admitted the fact, he became liable to repetition by *condictio indebiti*. The Appellant swears: "J'ai perçu des demandeurs en sus des intérêts payés a mon père, une somme totale de £96. Pour ce qui m'a été payé personellement, c'est-à-dire pour la dite somme de £96, je n'ai pas donné de reçu aux demandeurs." This case is precisely such as is stated in the Dictionnaire du Digeste of Thevenot-Dessaulles, Vol. 1, p. 103, No. 427, Condition de la chose non due. "Celui qui prétend avoir payé indument doit prouver qu'il ne devait pas." Leg. 25 ff. De probationibus et praesumptionibus. "Car la présomption est contre. Ibidem, "lors du moins que le défendeur convient avoir reçu. Mais si, au contraire, le défendeur avait commencé par denier qu'il eut reçu, et que le demandeur eut prouvé le fait du paiment, alors se serait au défendeur à prouver que ce qui lui a été payé, lui été réellement du. "Peretenim absurdum est, eum qui, ab initio negavit pecuniam suscepisse, postquam fuerit convictus eam accepisse, probationem non debiti ab adversario exigere.'" As to the fact that there has been no excessive interest over 6 per cent., I hold that it does not touch the case at all, and that it has no application to the case of Nye & Malo. I am therefore of opinion to confirm the judgment, and must therefore dissent.

DRUMMOND, J., also dissented, concurring with Mr. Justice Aylwin

MONDELET, J., was of opinion that the judgment should be reversed.

MEREDITH, J.—Thought it was only necessary to look at the declaration to see that the question of usury was the only question intended to be raised, and in point of fact it was the only question discussed before the Court at the argument. It was the point raised by the pleadings. In the plea, the defendant admitted having received the capital of the two obligations and legal interest, but denied that he had received anything more than legal interest. The parties themselves understood the case in this way, as was evident from their own statements. Defendant said he charged the extra amount as his commission. It was unnecessary for him to speak of usury, because plaintiff had made that the basis of his action. Where the plaintiff alleges a fact, the defendant is not bound to repeat it. Having made it apparent beyond the possibility of a doubt that usury was the basis of the action, the real question was, whether this interest having been exacted under a contract passed after the 16th Vic., Cap. 80, it could be recovered back. His honor reviewed the legislation on the subject. The usury laws having been abolished, the amount was not recoverable. The judgment must be reversed.

DUVAL, C. J., said the only witness plaintiff had was the agent, and he denied the fact that more than 6 per cent. was charged. He said he devoted considerable time to the business, and the extra amount paid was to remunerate him for his trouble. It could not be interest

because the money did not belong to the agent, but to his father. The plaintiff, therefore, found himself not only without evidence, but with evidence that disproved the allegations in his declaration. If this young man charged five per cent. commission instead of two or three, the Court had nothing to do with that. Persons exacted more for their time or the use of their money according to the demand. The judgment must be reversed, and the action dismissed.

Dorion & Dorion for Appellant; C. Archambault for Respondent.

June 7, 1865.

LEGENDRE *et al.* (defendants below), Appellants; and FAUTEUX (plaintiff), Respondent.—This was an action brought to recover the sum of $866, amount of a promissory note. The defendants pleaded that some hours before the institution of the action, the plaintiff offered to take $200 in cash, and notes for the balance; that defendant offered this amount, but that then plaintiff wished to charge interest at the rate of twenty per cent. on the notes accepted. Defendant refused to pay any interest at all, but after plaintiff had instituted his action he offered interest at the rate of six per cent. This offer was rejected, and judgment having been rendered in plaintiff's favor in the Court below, the defendants appealed.

MEREDITH, J., dissenting, thought the judgment should be confirmed. Though nothing appeared to have been said about interest, yet it must be presumed that the plaintiff intended to charge six per cent. It could not be presumed that a trader, dealing with a view to profit, intended to give up the interest which the law allowed him. If there had been a tender of six per cent. in time, it would have been all right, but the tender was not made till costs had been incurred.

MONDELET, J., also dissented.

DUVAL, C. J., thought it was quite clear that the understanding was there should be no interest charged. He thought the plaintiff's conduct in charging interest was a violation of that understanding.

DRUMMOND, J., concurred in the opinion that the convention between the parties, as proved, contained not a word about interest.

Judgment reversed, Meredith, J., and Mondelet, J., dissenting.

D. D. Bondy for Appellant; R. & G. Laflamme for Respondent.

GREGORY (defendant below), Appellant; and IRELAND (plaintiff below), Respondent; and the same party, Appellant, and the Boston & Sandwich Glass Company, Respondent. DUVAL, C. J.—The first of these cases turned upon the sufficiency of the affidavit for *capias*, and the second as to whether the debt was contracted in a foreign country. As to the sufficiency of the affidavit, the words wanting in one part were supplied in another, where the same allegation was repeated. As to the place where the contract was entered into, the Court was of opinion that it was in Montreal. As to the grounds which the plaintiff had for making the affidavit, there could be no doubt that the facts fully justified him in doing so. The defendant had previously run away from the Province. Not only was he insolvent, and without means of paying his debts, but he carried off $400 belonging to his partner in Montreal, which sum he applied to the purchase of a grocery business in New York.

DRUMMOND, J., had been inclined to dissent on the ground of insufficiency of the affidavit, and probably would have done so, had it not been so clear a case of fraud on the part of Appellant.

Judgment confirmed in both cases unanimously.

Leblanc & Cassidy for Appellant. J. L. Morris for Respondent.

MONETTE (defendant below), Appellant; and PHANEUF (plaintiff below), Respondent.—This was an appeal from a judgment condemning defendant to pay $237, due on a note. The defendant contended that the note had been altered in two places—*deux cents* having been substituted for *cent*, and the words *à douze par cent.* having been added.

MEREDITH, J., dissented in part. He agreed with the majority of the Court in thinking that the words *à douze par cent.* had been added.

DRUMMOND, J., said it was quite evident the words *à douze par cent.* had been added after the words *avec intérêt*, and he considered that there was positive proof that the words had been added after the note was made. The pretext of the plaintiff that he did not do business on a Sunday was absurd, it being the custom in the country parishes after mass to settle accounts, &c., and his scruples of conscience did not prevent him from altering the note.

Judgment reversed, Meredith, J., and Mondelet, J., dissenting.

Dorion & Dorion for Appellant; Doutre & Doutre for Respondent.

HANOWER (plaintiff below), Appellant; and WILKIE (defendant below), Respondent.

Held,—That there is nothing incompatible between the allegation of a verbal lease and a count for use and occupation

This was an action for rent under a verbal lease, with a count added for use and occupation. The action was dismissed in the Court below, on the ground that the plaintiff had not proved the verbal lease, and that the count for use and occupation could not avail him.

MONDELET, J., dissenting, was of opinion that judgment should be confirmed.

DRUMMOND, J., thought the form of action for use and occupation one of the most useful we had, and he accepted it accordingly. There was nothing incompatible between the allegation of a verbal lease and the count for use and occupation. The latter ought to follow the former.

Judgment reversed, Mondelet, J., dissenting, and judgment given in favor of plaintiff for $70, balance of rent.

James Armstrong for Appellant; Johnson & Piché for Respondent.

QUEEN *vs.* ELLICE.—Peremptory exception rejected.

COURT OF REVIEW.

June 22nd, 1865.

Present:—BADGLEY, BERTHELOT and MONK, JJ.

Attorney-General, *pro Reginâ*, and the Grand Trunk Railroad Company.

Held,—That the Court has a discretionary power to give precedence to any particular case, notwithstanding 27-28 Victoria, Chapter 39, Section 29 says: "the case shall be *heard in its order* on the first day in term on which it can be heard."

H. Stuart, Q.C., for Attorney-General; T. W. Ritchie for Grand Trunk.

[The same decision was given on the same day in Cairns *vs.* Hall.]

THE COLENSO APPEAL CASE.

The following is a letter of the Chancellor of the Diocese as to the effect of the judgment of the Privy Council in the Colenso case on the Metropolitan's powers.—

MONTREAL, 6th June, 1865.

MY LORD,—My attention having been drawn to a letter, purporting to emanate from "A Canadian Churchman," which is published in the last number of the *Echo and Protestant Episcopal Recorder*, copied from the *London Record*, I take the liberty to offer the following remarks in answer thereto:

As a matter of fact, it is not true that the late judgment of the Privy Council, in the case of the bishops of Capetown and Natal, either deprived you of the title and office of Metropolitan or declared your appointment as Bishop of Montreal illegal and invalid, nor is there anything in the remarks of the Judicial Committee who pronounced that judgment to justify such a statement.

The opinion expressed by their Lordships on the occasion in question was—that although her Majesty, "as legal head of the Church, has a "right to command the consecration of a bishop, "yet that the Crown has no power to assign him "any diocese;" and that "no metropolitan or "bishop, in any colony having legislative insti- "tutions, can, by virtue of the Crown's Letters "Patent alone, exercise any coercive jurisdic- "tion, unless such action on the part of the "Crown be confirmed by a colonial statute."

With this statement of the law, as enunciated by the Judicial Committee of the Privy Council on the occasion under review, it will not be inconvenient to indicate the precise facts connected with your Lordship's appointment as Bishop of Montreal, and the action of our Provincial Legislature in connection therewith.

On the 14th of July, 1850 (being in the 14th year of her Majesty's reign), by Royal Letters Patent, under the Great Seal of the United Kingdom, the then Diocese of Quebec was declared to be divided into two dioceses, whereof the Diocese of Montreal (according to certain limits therein defined) was declared to be one, and your Lordship was named and appointed to be bishop of such diocese, and the Lord Archbishop of Canterbury was commanded to ordain and consecrate you accordingly.

The ordination and consecration having been duly solemnized, your Lordship was duly inducted and instituted as Bishop of the Diocese of Montreal in the month of September, 1850.

In the following year the Provincial Legislature, by the Act 14th and 15th Victoria, Chapter 171, in which the Letters Patent of the 14th of July, 1850, are expressly referred to, enacted that there should be a separate Church Society for the Diocese of Montreal, as constituted by these Letters Patent, and that such Society should be composed of "the Lord Bishop of the Diocese of Montreal" (namely, your Lordship,) and the several other persons indicated in the act; and that the said Bishop of Montreal and his successors should be "a corporation sole," and "be deemed to have been so from the time when the Letters Patent aforesaid *took effect*." And in the act (Chapter 176) of the same period, the Letters-Patent, and the division of dioceses thereby created, are again expressly alluded to, and the *status* of the then Bishop of Montreal fully recognized,—and in other subsequent acts of our Legislature the legal existence of the Diocese of Montreal and of the Bishop of Montreal is clearly admitted.

Whatever doubt, then, may exist in the mind of any captious person as to the strictly legal right of the Crown in the first instance to erect the Diocese of Montreal, and to appoint your Lordship to be its bishop, there can be no room for doubt as to the action of the Crown in this respect having been confirmed by the Canadian Legislature in the most ample form that could be desired.

In the judgment under consideration it is also conceded that "pastoral or spiritual authority" is "incidental to the office of bishop," and that the Crown may also legally appoint a metropolitan, with right of pre-eminence and precedence, although anything like power of coercive jurisdiction is denied to him in a colony such as this. Being thus appointed, your Lordship, in ordaining and consecrating the bishops of Ontario and

Quebec, under the special delegation to that end from her Majesty, cannot therefore be held by reason of anything contained in the judgment in question, to have transgressed the authority admittedly vested in you in your pastoral or spiritual office of Bishop and Metropolitan.

Before bringing these remarks to a close, it may not be improper to remind your Lordship that in a letter addressed to you by Sir Robert Phillimore, Doctor of Civil Law, and the Queen's Advocate (whose opinion ought to be pre-eminent in such matters), after the rendering of the Colenso judgment, and which I had the privilege of perusing, that distinguished jurisconsult unhesitatingly endorsed the opinions of Mr. Cameron and myself, on the validity of Provincial Synod proceedings,—and further stated that, in his opinion, the Canadian bishoprics stood wholly unaffected by the judgment which "A Canadian Churchman" has erroneously thought to have produced the sadly chaotic results he so triumphantly proclaims.

I have the honor to be,
My Lord,
Your most obed't servant,
STRACHAN BETHUNE, Q.C.

OBITUARY.

The Hon. J. S. McCord, one of the Justices of the Superior Court for Lower Canada, died at Montreal early on the morning of June 28th, 1865. The *Montreal Gazette* gives the following notice of his life:—

He was born near Dublin on the 18th day of June, 1801. His father came here in 1806 on business, and settled in this country. Judge McCord was sent to school to the Rev. Dr. Wilkie, at Quebec, where he was a schoolfellow of the Hon. Edward Black and the late A. C. Buchanan, Q.C., two of the most eminent of Lower Canadian lawyers. He afterwards was for some time a student at the Seminary of St. Sulpice in this city, where he gained a perfect mastery of French. He studied law in the office first of the late Chief Justice Rolland, and subsequently in that of the late Mr. Justice Gale, and was called to the Bar in 1822 or '23. He continued to practice his profession until the outbreak of the rebellion in 1837, when he entered the volunteer service, raising a cavalry corps and becoming commandant of a brigade of cavalry, and for a time also of the whole militia force in Montreal. On the reorganization of the Courts by the Special Council, he became a District Judge and Judge of the Court of Requests, and subsequently Judge of the Circuit Court. Later, on the reorganization of the Judiciary in 1857, he became a Judge of the Superior Court. He has thus been on the Bench for 23 or 24 years, and in that time has done judicial duty in every portion of the old District of Montreal, embracing about half the population of Lower Canada. Although not standing foremost among the jurists who have won celebrity among the members of our Bench and Bar, he has yet proved an eminently useful and paintaking judge, whose decisions have uniformly stood the test of appeal more successfully than those of most other men upon the Bench. Few or none of them have indeed been altogether set aside. He was not content to be a jurist simply, or devote himself exclusively to that jealous mistress, the Law. Besides his soldiering for several years, he was for years a zealous student of natural history, and one of the founders of the Montreal Natural History Society. He was an ardent lover of horticulture too, and alike in the choice of a site for his residence at Temple Grove, and in the laying out and culture of his grounds, showed his love for the beautiful in Nature and the art which, by culture, so enhances her beauties. He was also a promoter of some of our best charities, and was for years a director of the Montreal General Hospital. He was an ardent Free Mason, several times Master of St. Paul's Lodge, and attained all or nearly all the dignities attainable in Canada under the Grand Lodge of England. But the work into which he threw most of his heart and soul during his later years—next after his judicial duties, if not equally even with them—was the promotion of the interests of the religious community to which he belonged. A zealous, true-hearted member of the English Church, he was also a warm friend and admirer of the present Bishop of this diocese, and an ardent fellow-laborer with him in everything which could promote the interests or welfare of the Church. He was successively Vice-Chancellor and Chancellor of the University of Bishop's College, Lennoxville, which office he held at the time of his death. He was the active promoter of the establishment there of the Grammar School, now such an eminently successful feature of the institution. In the Church Society he took a most active part with the late Mr. Moffatt and others in the work, more especially of the Central Board and

Lay Committee, of which he was for several years Chairman. He was also one who labored most zealously in putting the funds for widows and orphans of deceased clergymen on a satisfactory basis, and to promote the formation of a sustentation fund for the partial endowment of the clergy of the diocese. He performed a great deal of patient drudgery in making up a schedule or cadastre of the properties belonging to the several parishes and missions in the diocese in order to show where and what more was needed to be done, and investigated the titles, and set those which were imperfect right. He was a leading member of both the Diocesan and Provincial Synods, where he will be much missed. The last public business he transacted was to rise off his sick bed, against the remonstrances of his family, to appear in his place in the Diocesan Synod to see some business carried through which he deemed of importance. When remonstrated with about his imprudence, he replied: "What matter? It is duty; and sooner or later I must die in harness." His last judicial business was undertaken in the same self-sacrificing spirit. Owing to the illness and over-tasking of several of the judges, the Beauharnois Circuit had been on several occasions neglected, and the matter was brought up in Parliament by the representatives of that district. When urged by the Attorney-General to take the duty there for one term, and the difficulties of the Government pointed out to him,—the blame, in fact, cast upon them by Parliament for neglect,—he replied: "I will go if it kills me." He held the last term there, and returned home ill. It will be thus seen how continuous and multifarious have been his labors for the public—in how many places his presence and counsel and assistance will be missed. But not alone in the public places he was wont to labor in will he be missed. Gifted with refined tastes, fond of pictures, statuary and books, as well as flowers, of a most happy and genial disposition, affable and courteous in his manners, he made himself beloved in private and social life, and leaves behind him almost numberless friends in different parts of the country, who will read of his departure hence with heartfelt and unqualified regret. He was married in 1832 to Miss Ross (daughter of the late David Ross, Q.C.), who survives him, and by whom he leaves a family of three sons and two daughters. The funeral ceremonies took place on the 1st of July.

CALLS TO THE BAR—DISTRICT OF MONTREAL—SINCE JAN. 1, 1865.

2nd January, 1865.—Napoléon Legendre, Adolphe Nadeau, Magloire Desjardins, Charles Auguste La Rue.

6th February, 1865.—Trisque Letendre, Louis Renaud.

3rd April, 1865.—Honoré Mercier, Joseph A McLaughlin.

1st May, 1865.—F. X. Desplaines.

5th June, 1865.—J. A. Simard, H. A. Turgeon, Louis H. Collard, W. R. Kenney, F. E. Gilman, J. C. Gagnon, J. Napoléon Mongeau, Pierre P. Daunais.

L. W. SICOTTE, *Secretary*.

APPOINTMENTS, CHANGES, &c.—T. K. Ramsay, Esq., Q.C., to be Crown Prosecutor for the District of Montreal, in the room of F. G. Johnson, Esq., promoted to the Bench. F. G. Johnson, Esq., to be Assistant Judge of the Superior Court. Mr. Justice Smith, of the Superior Court, has obtained eight months' leave of absence, dating from 1st July, 1865.

SINGULAR CHARGE.—The *Times'* Paris correspondent, May 13th, cites a passage from the charge of Judge Metzinger, at a recent trial, before the Assize Court of Paris, of a man who attempted to murder a married woman with whom he had had a *liaison*: "What is this man who is exposed to face it (the guillotine)? You have witnessed his attitude during the trial? You wished to draw something from him? I have sounded him in every sense, but there was no response. I have found in him only weakness, cowardice and fear,—and this desolating spectacle has doubtless inspired you, as it has me, with disgust and contempt." "These words," adds the *Gazette des Tribunaux*, the special organ of the law courts, "exercised great influence on the decision of the jury, who, after a quarter of an hour's deliberation, brought in a verdict of guilty."

CHANGE OF SURNAME.—Since the celebrated Jones-Herbert case, the change of surname by mere publication of an intention to do so, seems common. Can any of your readers inform me whether this act does or does not *legally* change the name of children *living at the time* when their father indulged his innocent fancy by giving himself a new name? It strikes me they retain the one to which they were born.—CAMBRIAN.—*Notes and Queries.*

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THE BAR OF LOWER CANADA AND THE BAR OF ENGLAND.

In putting together a few rather desultory notes respecting the bar of Lower Canada, with some comparisons between it and the bar of England, I do not profess to do more than touch lightly upon topics, to develop which would compel me to exceed the bounds of a brief paper. I propose to advert in the first place to the numerical strength of the profession, its emoluments and the difficulty of success. I shall make a few observations upon the judicial system, and lastly on the relations of the bar with the bench and the public.

We have no statistics of the number of advocates in Lower Canada in the present year, but it probably falls little short of 600. According to the census of 1851, the number of advocates was returned at 273, 86 of whom were in Montreal and 80 in Quebec. The notaries in the same year numbered 538, of whom 35 were in Montreal and 50 in Quebec. The number of legal persons, exclusive of notaries, in Upper Canada, is considerably greater. In 1851, the number of barristers and attorneys was set down at 302, 83 of whom were in Toronto, 31 in Kingston, 22 in Hamilton, 10 in Ottawa and 7 in London. According to the census of 1861, the number of advocates had increased to 489, of whom 163 were resident in Montreal, 125 in Quebec, 21 in Three Rivers, and 9 in Sherbrooke. The notaries in 1861 numbered 571, of whom 73 were in Montreal and 59 in Quebec. The business of serving writs, levying executions, &c., was performed by 393 bailiffs. In Upper Canada, the number of barristers, attorneys, &c., had increased in 1861 to 632, there being 169 in Toronto, 20 in Ottawa, 12 in London, 27 in Kingston, and 44 in Hamilton.

In England, the profession in 1855 contained 4,035 members, (barristers.) In 1810, the number was only 880; in 1821, 820; in 1830, 1,129; in 1840 it had increased to 1,S35, and in 1850 to 3,268. To these must be added 13,256 solicitors, attorneys and writers to the signet. They are assisted by 1,436 officers of courts of justice, 16,626 law clerks, of whom 9,270 are under 25 years of age, and 1,087 law stationers. The superior or local judges number 85. Of the 4,035 barristers, 500 are occupying public employments that debar them from practice; about 300 are resident in Ireland and the colonies, leaving about 3,235 as the number to whom the profession is open.

If we set down the number of legal persons, including judges, advocates and attorneys, and notaries, in all Canada at 2,000 in the present year, we have almost as great a numerical strength in proportion to our population of 2,800,000, as the English lawyers, numbering in 1855 18,422 persons, to the 23,000,000 population of England, while the vastly greater importance of the cases in England causes the scale of business to preponderate against us.

I proceed to say a few words respecting the difficulty of attaining success at the bar, and the emoluments which await success. There being much less difficulty in obtaining remunerative business as an attorney or solicitor than as a barrister in England, it is not uncommon for the lawyer to pave the way to practice at the bar by serving for a year or two as an attorney. The difficulty of attaining even moderate practice is so great that it is estimated that not more than 500 barristers in England live and prosper by the profession. The difficulty has been expatiated upon by many writers. The following is an extract from Byerley Thompson, (Choice of a Profession, p. 121.)

"When turning to the consideration of the moral qualities required for the bar, it is but right earnestly, even solemnly, to charge my reader to consult deeply before he launches on the sea of trial that the first years of the life of a junior barrister present. It has been described as eating "sawdust without butter." Indeed no trial in any other profession can equal it. It is made up of solitude, want of occupation and disappointment. Five junior barristers out of ten, whom fortune has not endowed with sufficient income to marry, reside either in chambers in their inns, or are the tenants of lodgings, and the habitués of clubs. The junior's life will vary from term to circuit,

from circuit to sessions, and from sessions to circuit, in one unsuccessful round for years, and he ought, before he take this course, to answer well these questions: Can you live alone? Can you keep away from temptation in the midst of forced idleness, or can you create occupation for yourself? Can you live for years without the daily solace of household affections? Can you bear up against trial and sorrow without aid or sympathy? Can you sit patiently for years in court or chambers, and see younger men passing you? Can you bear to see inferior men succeed, when you, a man of talent, have never been afforded an opportunity? Can you go on believing, until you are grey-headed, 'that there is a good time coming, wait a little longer?' Can you do all this without becoming intemperate, bitter, soured, or misanthropical? If you can do all this, you may safely go to the bar, for with such qualities you might conquer an empire."

It may be curious to compare the foregoing with the remarks of Oliver Wendell Holmes on the prospects of the medical student, in the course of an address before the Boylston Medical Society of Harvard University;—

"Some plain truths have been recently laid before the student as to the time during which he must, in most cases, be content to live on his future expectations. If fifteen years, as it has been said, are required to obtain a good city practice, of course, where no accidental aid or peculiar good fortune conspires with the requisite industry and ability, a long and dreary blank separates many of you from the object of your ambition. What becomes of medical men during this long period? The answer is not a flattering one. Many of them lose their impulse and ambition, shrink in all their intellectual dimensions, become atrophied and indurated, so that at the period when they have attained success, the sunshine comes too late for their development into their natural proportions. Many are worn out with long waiting, and seek for some other pursuit where their faculties may be called into active service. A few only, like the steady oak, add a new and wider ring to their mental growth with every year that creeps torpidly by them."

Both of these pictures are possibly highly colored, and of course are not applicable to our small cities, where the avenue to practice is comparatively easy, though the emoluments awaiting success are proportionably small. In England, on the other hand, the wealth and the grandeur of the honors that generally attend success, are calculated to attract and dazzle. To take one or two instances. The emoluments of Lord Eldon, during the six years he was attorney-general, varied from £10,000 to £12,000 per annum. The office of attorney-general is now understood to be worth £12,000 a year, independent of private practice. Sir William Follett, after a few years' practice, is said to have left £200,000 behind him. During the railway excitement in England, it is stated that the leader of the Parliamentary bar received 2,000 guineas for making a single speech. Then there are the legal appointments with high salaries attached;—the lord chancellor, the lords-justices, master of the rolls, three vice-chancellors, and twelve masters in chancery, fifteen common law judges, ecclesiastical judges, &c. "Such a glittering array (Warren's Law Studies,) of substantial honors and distinctions, while dazzling the aspiring eye which contemplates them, cannot fail in the case of a thoughtful observer, to suggest the certainty that they cannot be obtained without the greatest difficulty. The best and most highly trained intellects in the kingdom are, with their utmost energies, constantly competing for them; and numerous as are the prizes, they must ever bear a small proportion to the constantly increasing number of candidates."

In Lower Canada the grandeur of the legal prizes is far from dazzling, and their number is easily summed up. It is true that a considerable number of appointments are filled up by members of the bar, but the salaries attached are moderate. Thus there are two chief-justices, (Court of Queen's Bench and Superior Court,) at $5000 each; four puisné judges of the Court of Queen's Bench at $4000, and seventeen puisné judges of the Superior Court at from $4000 per annum downward; a judge of the Vice-Admiralty Court; Prothonotaries, Sheriffs, Clerks of the Crown, Crown prosecutors, &c. It would be difficult and perhaps uninteresting, to form any accurate estimate of the incomes derived by Canadian advocates from their practice, but it may,

I think, be safely assumed that while much larger incomes have been, and are, occasionally realized, yet $5000 per annum is a high figure for a first class advocate,—a figure attained by few, while the much larger number making half that sum steadily, will be tolerably hard worked.

But leaving this unedifying topic, let us glance for a moment at the judicial system in England and Canada. The bar of England is almost entirely concentrated in London. The fifteen judges who sit at Westminster, administer justice at every assize town in England. This differs very materially from the system in France, where there are local bars all over the country, and twenty or thirty Imperial Courts, each supreme over a certain number of departments, subject only to the *Cour de Cassation*, which can review the judgments of every court in the Empire. It necessarily follows that the bar of France is scattered over the country. One of the effects of this is a more equal distribution of employment. For an English barrister of note may be engaged in every important case in a number of the Circuits; but this cannot occur in France where twenty or thirty Imperial Courts are sitting at one and the same time. In Lower Canada, since the decentralization measures were carried out, our system bears a greater resemblance to the French. The appeal side of the Court of Queen's Bench, it is true, sits only at Montreal and Quebec, but the terms for the dispatch of Crown business and the terms of the Superior Court are held all over the country, so that advocates, more or less numerous, are established at Sherbrooke, St. Hyacinthe, Three Rivers, Sorel, and elsewhere, thus attempting to satisfy the popular demand that justice shall be brought to every man's door. Next, as to the relations of the bar to the bench. Our judges are almost invariably, as in England, selected from the practising advocates, and when the appointment is once made, there is very little subsequent promotion. In England there is still less promotion from one court to another. The barristers promoted to the Bench generally remain in the same court as long as they continue on the Bench. In France, on the contrary, the judges are far more numerous, and form in a great degree a distinct class, being promoted from the less to the more important positions. The official advocates, moreover, form a compact class, *ministère publique*. In England the same counsel prosecute one day and defend the next; the attorney-general holds his brief from the Crown as from a private client; but the French *procureur* or *avocat-general* sits on the Bench with the judges, and is remunerated by the government, which so to speak, is his only client. In Canada, the attorney-general and solicitor general are political personages in receipt of a salary, but still they generally continue (by means of a partner,) their private practice at the bar, and our Crown prosecutors are generally at liberty to practice as private advocates in the Civil Courts where not retained by the Crown.

Lastly, as to the relation of advocate to client. In this country, there being no distinction between the classes of barrister and attorney, the same person who originally receives instructions from the client, generally conducts the case to its final issue. Even if it be appealed to the Privy Council, there is nothing to prevent the Canadian advocate from appearing before the court of final resort. This system which bears more resemblance to the French than to the English custom, probably gives the advocate a warmer and more constant interest in the success of his client's cause, than is felt by the English barrister of established reputation, receiving his brief from an attorney. It also gives the barrister a more practical and intimate knowledge of the details of procedure. On the other hand, it may be urged that it is not good for the advocate to be in immediate contact with the hopes and fears, likings and dislikes of his clients. Moreover, some of the qualities of an orator, ease and grace of gesture, strength and tone of voice, are not always found united with the patience and legal acumen necessary to the attorney in sifting a case, and so forth. Having, however, already exceeded my prescribed limits, I shall not attempt to enter here upon the discussion of this subject. X.E B.

REMARKABLE TRIALS IN LOWER CANADA.

No. 2. The St. Jerome Murder of 1858.

The village of St. Jerome, on the night of the 18th January, 1858, was the scene of a most atrocious and dastardly murder. The victim, Catherine Prévost, was the wife of Antoine Desforges, an inhabitant of the place, and a man bearing a tolerably fair character. About midnight, the persons in the house of Antoine Desforges aroused the neighbors with the intelligence that Catherine was dying. The first that arrived on the spot, Rosalie Baron, found life already extinct. Catherine, a woman somewhat past the middle age, had not been in very good health. She was becoming feeble and sickly, but still continued to toil uncomplainingly at the duties of her household. Her life, however, did not ebb fast enough to satisfy the inhuman desires of those around her, and her feeble health became the very means of covering up a plot for cruelly putting her to death. Suspicion, however, was awakened, and naturally fell upon the persons who were in the house at the time. These were Jean Baptiste Desforges, the brother of Catherine's husband, and a female, named Marie Anne Crispin, generally known as the widow Belisle. Antoine Desforges, the husband of deceased, was absent on that night, but he also was held to answer the charge of murder.

The trial began at Montreal on Friday, the 16th April, 1858, before the late Chief Justice Lafontaine and Mr. Justice Aylwin. Mr. Monk, Q.C., appeared for the Crown. The defence was conducted by Mr. Smyth on behalf of the two brothers Desforges, and by Messrs. Smyth and Cassidy jointly on behalf of the female prisoner.

The indictment contained three counts:—1st. Charging the Widow Belisle with the murder of Catherine Prévost, charging J. B. Desforges with assisting in the same murder, and charging Antoine Desforges with being an accessory before the fact.

2nd. Charging the Widow Belisle and Antoine Desforges with the murder, and J. B. Desforges with being an accessory before the fact.

3rd. Charging J. B. Desforges with murder, and Widow Belisle and Antoine as accessories before the fact.

The first witness called was a neighbour, named Rosalie Baron, who resided in a house belonging to Antoine Desforges, situated at a distance of only thirty feet in the rear of Antoine's residence. At half-past five in the afternoon of the 18th, this woman, Rosalie Baron, went to Antoine's house to assist his wife in washing. The following is her account of the events of the evening and night:—

"A little after I arrived, Antoine Desforges said to me, 'My wife was very much disturbed all night, but she has been well since morning.' On this, I remarked to the deceased, 'I think you are better to-day, but not altogether well;' and she answered, 'I assure you, I am not yet better.' Shortly afterwards, about a quarter to seven the same evening, I returned to my own house. Jean Bte. Desforges came over to my residence to play cards. About half-past nine, I went over to the house of Antoine Desforges, and saw his wife Catherine in company with Widow Belisle, sitting near the fire. Catherine said to me, 'You should not have come out in the cold without covering.' Widow Belisle remarked, 'Some people don't know the effects of cold.' Shortly afterwards, I went home, and saw Jean Baptiste Desforges in my house. I told him I had seen Widow Belisle with his sister-in-law. The evening before this, Sunday evening, Jean Baptiste, when he came from prayers, seeing his brother's wife lying in bed, said, 'How much like a corpse she looks.' About a week previous to this, he told me that his brother Antoine was about to go to Chatham, and that he, Jean Baptiste, was to remain at home with his, Antoine's, wife; but, at the same time, he remarked that he would not do so for any amount, because, as she was sickly, she might die suddenly, and he might be suspected of having caused her death. On leaving my house, on the 17th, (Sunday,) Jean Baptiste remarked to me, 'Catherine has not two months to live—perhaps not a fortnight, for this day she has done her last cleaning.' I am myself aware, that deceased often complained of disease of the stomach. At midnight, on the 18th, Jean Baptiste came to inform me that Catherine was dying. I went out with him; and when we arrived at the house, she was lying

with one arm on her stomach. The Widow Belisle was present. Catherine was already dead and cold. I remember asking Widow Belisle whether Catherine died in pain. She replied, that she placed her left hand on her stomach, and exclaimed, 'O my God, I am suffocating.' Widow Belisle slept with the deceased, and had given her a cup of ginger tea before going to bed. The next morning, Antoine, who had been absent, came to the house about half-past eight. He remarked, as he came out of the room, after looking at his wife, 'If I had staid at home, my wife would not be dead.' Widow Belisle answered, 'Is it not true that you asked me to come and stay with your wife? He replied in an angry manner, 'No.' He seemed much grieved. Widow Belisle again said to him, 'Did you not tell me to come and sleep with your wife?' He then said, 'If I did, I don't remember.' Doctors Prévost, Larocque and Desjardins made an examination of the body."

The next witness examined was a midwife of St. Jerome, named Adelaide Fortier. Her statement would appear to show that Widow Belisle did not bear a favorable character in the neighbourhood. She said:—

"About half-past twelve in the night of the 18th, Jean Baptiste Desforges came to my house, and asked me to come and see his brother's wife, who was dead. I inquired whether she died alone. He answered, 'No, Widow Belisle was there.' I then refused to have anything to do with the body till the doctors should arrive; because I did not like to hear that she had died while Mrs. Belisle was present."

So far, the evidence of the prisoners' guilt does not appear very conclusive. The circumstances were not irreconcilable with the supposition that Catherine Desforges had died a natural death, and the medical examination made at the time was slight and insufficient. Strong suspicions of violence or death by poison, however, existed among the people of the village. An enquiry was held by Mr. Scott, J.P., and the two brothers Desforges with Widow Belisle, were arrested on the charge of murder. We now come to certain statements or disclosures made by the female prisoner. These were sworn to by one Laurent Beauchamp as follows:—

"While the female prisoner was in jail, I transacted her business. I told her that she could not be bailed out till the doctors had examined the stomach of deceased. Her reply was, 'They cannot find any poison, for there is none.' At the same time, she said to me, 'I will tell you how the matter happened, and then you will know all about it." But I did not listen to her, and went home. About a fortnight afterwards, she resumed the subject, and told me that Catherine did not die naturally, but that she, Mrs. Belisle, was clear from the crime of causing her death. She then informed me that she had not committed the deed, but that she was sleeping by the side of deceased, when another person (whose name the witness was not allowed to state) put a pillow over Catherine's mouth, and sat on it for some time. After this person got off the pillow, deceased gasped a couple of times, and expired. Widow Belisle then went out and roused the neighbors."

The trial was resumed on the 17th of April, when J. B. Belisle, son of the female prisoner, made the following statement:—

"On the 17th of January, I was at the house of my mother, at St. Jerome. Saw there J. B. Desforges. He said he was going, about sunset, to do some little jobs for his brother, who was absent. My mother also informed me that she would sleep at Antoine's house that night. My father died in 1856. Before he died, there were difficulties between him and my mother, on account of Antoine Desforges, who frequently visited at the house. My mother has mentioned to me that it was not she that caused the death of Antoine's wife, but another person (not allowed to be named in Court, but evidently meaning J. B. Desforges.) This person, she said, put a pillow over Catherine's mouth, and sat upon it. My mother said, that while this person was sitting upon the pillow, she felt the limbs of deceased stiffen. My mother further told me, that when she became aware of what was going on, she started up in the bed, and said to the other person, 'O my God! what are you doing there?' The other replied, 'If you don't shut up, I will do the same to you.' My mother then got out of bed, and told the other to light a candle. Catherine then gasped twice, and expired."

Another son of Widow Belisle, Isidore Legault, deposed that he had received the same account from his mother, during a visit which he made to her in jail; and that she had not disclosed the facts sooner because she was in danger of her life. These disclosures confirmed the suspicions already excited and revealed the cause of death. There was also some

term of the Queen's Bench which presents a jury in a new aspect. In the case of West, tried for larceny on the 26th September, the jury, after rather a lengthened absence, came into Court stating that they found the prisoner guilty of *petty* larceny, and recommended him to mercy. Now neither the counsel for the prisoner, nor the prosecutor for the Crown, nor yet the Court, had made the slightest allusion in the course of the trial to such a charge as petty larceny. Yet some crotchety individual on the jury, eager to display the result of some private legal researches of his own, and unconsciously exemplifying the truth of the maxim about a little knowledge, had actually persuaded his fellow jurors to adopt a verdict in which an attempt was made to draw a distinction which the learned judge presiding assured the jury had long ceased to exist.

THE SEPTEMBER APPEAL TERM.

The last term of the Court of Appeals at Montreal was chiefly memorable for the unanimity which prevailed, not only between the individual members of the Appeal Court, but also between that Court and the Courts below. Out of nineteen cases decided, the judgment of the Court below was confirmed unanimously in *sixteen*, and the appeals dismissed! In only three cases was judgment reversed, and in only one of these cases was there any dissent. This, we believe, almost unprecedented unanimity is no doubt accounted for to some extent by the fact that in consequence of only four judges being present, the more important cases, fifteen in number, were retained *en délibéré*. Nevertheless, the statement recorded above is rather surprising, and, assuming that the appeals dismissed were all unfounded, would seem to indicate a belief on the part of some members of the bar that in appealing even bad cases there is some chance of success.

CORRESPONDENCE.

DÉLIBÉRÉ.

MR. EDITOR—One of the great defects in the practical administration of justice in our Courts, which must have attracted the attention of other practitioners, and perhaps of the public, is the system of *délibéré*.

It is the practice of the Judges in our courts to take almost every cause, even the most trifling, *en délibéré*, as it is called, and the records, after argument, are said to go *en délibéré*, which means into the Judges' *green* bags, a sort of legal purgatory, out of which they emerge often after *months* of *deliberation*. I take it that this *practice*, as a system, is bad; that in most cases, treated thus, no legal difficulty has arisen; then why deliberate? That delays are dangerous and injurious to both suitors and the profession, must be admitted; and unless it can be shown that a *délibéré* is necessary in every cause, to enable the Judge to make a *safe declaration* of the law, let some remedy be found. Our whole system, I think, may be said to be cumbrous and tedious; and, no doubt, an unfitness for promptitude of decision in our *judicial* minds is one of the results of such system, together with this bad habit. Any one of us who has had the opportunity of attending, in England, the *Nisi Prius* and other Courts, must have been struck with the dexterity and despatch with which business is conducted.

The Judges and Bar are ready men. Judges do not hesitate to *declare* the law on the spot; and Counsel must be prepared to dispute the point, or submit. No doubt *their* system and practice make the *ready men*. With us, when we have a "jury trial," I admit that both Judges and Counsel always show preparation. I wish all causes of importance, where facts had to be appreciated, could, with us, be taken before a jury, and abolish that torturing of evidence called *Enquête*, an immoral practice, where all the true features which constitute evidence or truth, are kept from the view of the Judge who eventually decides the cause.

I do not make these remarks without suggesting some relief. Let the Bench and the Bar combine, with a desire of doing good, and a *regard to justice*, and endeavour to promote the despatch of business. Our system of pleadings is special and good enough; an issue is raised prominently in each case, capable of being seen and appreciated promptly. In important cases where new points are raised, let them be reserved for deliberation. Let the Counsel engaged in finally submitting causes for decision,

execution. It was formally announced by the Rev. M. Villeneuve that the female convict had confessed her share in the murder; that she had held the legs of the unhappy Catherine, while Jean Baptiste sat upon the pillow which covered her face. The other convict also confessed his guilt in the presence of the R. C. Bishop, and both convicts repeated the confession on the scaffold. The motive for the inhuman deed was astonishingly weak. Both the brothers Desforges appeared to have indulged in an illicit intercourse with Mad. Belisle, regardless of the existence of their victim, who would appear to have been removed chiefly on account of her presence having become distasteful.

We may add that Antoine Desforges was detained on a charge of poisoning, but, during the next term, (Oct. 9th) Mr. Monk, Q. C., entered a *nolle prosequi*, stating that there was not sufficient evidence to sustain the charge.

NOTICE OF JUDGMENTS.

Among the chronic grievances of the members of the bar, there is perhaps none which is so frequently subject of complaint as the irregular system of rendering judgments which now prevails. There are few lawyers who are not willing to make considerable sacrifice of ordinary engagements for the purpose of being present in Court while judgments are being pronounced. Apart from their natural interest in the decision of their own cases, they are aware that listening to the words of living judges is about the best teaching they can have, and more valuable to them in practice than treble the time spent in study. There are features of the oral judgment which cannot be conveyed to the mind of the reader by the most faithful report. The very tones and gestures of the judge are at times full of meaning, and modify his spoken words. But advocates cannot attend Court every morning during term on a bare possibility of judgments being rendered, and thus they often miss the very day they desire to be present. In the Superior Court some approach to regularity has been made by allotting the last juridical day of the month to judgments. This is good so far as it goes, though open to the objection that there are generally too many judgments to be given on one morning, and the judges who come in last are likely to find the auditory thinned and fatigued by a sitting of two or more hours. The fixing of two days, say the last of the one month and the ninth of the following month, would do away with this objection, and, moreover, enable important cases, not decided on the last of the month, to be disposed of without too long a delay.

But though one day has been set apart in the Superior Court, uncertainty is not thus avoided. Important final judgments are frequently given by a single judge on any day in term without previous notice of time or place. In a quiet nook, rapidly and undisturbed by the too intrusive presence of the bar, the decisions are muttered over in a most unsatisfactory manner, the reasons of the judgment being sometimes very imperfectly stated.

We have been referring chiefly to Montreal in the foregoing remarks, but the same system, or want of system, we understand prevails at Quebec. No day is fixed for the rendering of judgments in Appeal, and it has happened that members of the Montreal bar attending the Court at Quebec for the purpose of hearing the decision of a case in which they were concerned, were obliged to leave without attaining their object, in consequence of the postponement of judgments from day to day. We can easily understand that it may occasionally be difficult to give a lengthened notice of judgment days, but can see no difficulty in giving some notice however short. The notice, too, should not be merely verbal, but in writing and posted in some conspicuous place.

VAGARIES OF JURIES.

The behaviour of some of our petit juries verges at times upon the ludicrous, and does not a little to bring the institution of trial by jury into contempt. Their proneness to acquit in the face of the most convincing proof has often been the subject of remark; but a case occurred at the last

count of the amount of such dues containing a simple notice that the same remains unpaid, and that the Corporation or Municipality claims the sum. The Sheriff would return all such demands with his proceedings. They would be collocated without costs or other formality, and be liable to contestation, the same as any other demand. I may hereafter furnish you with further instances.

A.

NOTICES OF NEW PUBLICATIONS.

REVIEW OF THE INSOLVENT ACT OF 1864. Translated from the French. By Désiré Girouard, B.C.L. 1865. Montreal: John Lovell.

The necessity for a Bankruptcy Law had long been under consideration. It was discussed by the Press, by Boards of Trade, and by the Legislature. Various measures had been brought forward, but none were carried through. Mr. Abbott, Q.C., a distinguished member of the Montreal bar, while filling the office of Solicitor-General for Lower Canada, made the first successful attempt to grapple with the difficulty, and introduced a bill which was favorably received by the House. Notwithstanding the opposition of those who questioned the expediency of a bankrupt act at all, and denounced such legislation as an unwarrantable interference with the rights of creditors, it is now matter of history that Mr. Abbott's Bill, with some alterations and modifications made after his retirement from office, finally became law in 1864.

It was not to be expected that a law which made such great and important changes in our system of procedure should at once work smoothly. Several defects and inconveniences, and still more clauses of doubtful meaning, were discovered and complained of. Many of these ambiguities were subsequently explained in an able commentary on the Act, published by Mr. Abbott. But before this commentary appeared, Mr. Girouard, already favorably known as a writer on legal subjects, commenced a series of annotations on the Act, which were first published in a daily newspaper, but subsequently appeared in pamphlet form. He has since published an English translation which is now before us, and we shall embrace the opportunity to refer briefly to some of the points which he has commented upon.

Mr. Girouard is evidently of opinion that the Act is too favorable to insolvents, and proportionably unsatisfactory to creditors, who, as he remarks on Page 6, "do not find in it the guarantee which was promised, or the simple, short, clear and easily understood dispositions which they ought to understand and be able to apply, without possessing the skill of its author, a man well known to all as thoroughly conversant with the practical affairs of commerce and with the laws relating thereto." Page 17, the author remarks that the Act makes no mention as to whether the creditors are sufficiently authorized to choose a secretary *pro tempore* at their meetings. This is a point which we think could occasion little difficulty, it being one of the first steps at all ordinary meetings to appoint a chairman and secretary. Page 19, Mr. Girouard, differing from Mr. Abbott, contends that according to the obvious construction of the Act, the assignee is to be nominated by the majority in number of the creditors, and not by the majority in number and in value. We fail to see how such a construction can be put upon the clause. In fact, the very words cited by Mr. Girouard, "if any dispute arises at the first meeting of creditors *as to the amount* which any one of the creditors is entitled to represent in the *nomination of an assignee, &c.*," shows that value is one of the elements to be considered.

P. 25, the author condemns the use of the word 'neglect' in the following clause of the Act, "but no *neglect* or irregularity in any of the proceedings antecedent to the appointment of an assignee, shall vitiate an assignment, &c." Mr. Girouard remarks that the use of the word neglect in this connection is immoral in law, and tantamount to the approval of fraud.

On P. 39, the commentator raises a point which would seem likely to occur, though perhaps very rarely. The Act says that any two or more creditors for sums exceeding in the aggregate $500, may make a demand upon the debtor requiring him to make an assignment. Now suppose the trader has only one creditor, a case which Mr. Girouard thinks cannot fail to present itself in actual practice, for it sometimes happens that a trader makes all his purchases and transacts all his business with a single house. If the debtor will not pay, how can the protection of the law be refused to this single creditor? Besides, it may happen in small towns that the claims of the two largest creditors do not together amount to quite $500. Why in such case preclude them from demanding an assignment?

On P. 70, Mr. Girouard points out that there are no instructions in the Act as to how the assignee is to deal with oppositions to the sale of real estate. The assignee's functions resemble those of a sheriff, but as

to the claims of third parties, it would seem that he is also to be a judge. A little further on (P. 78) the author cites from a treatise by Mr. Edgar of Toronto, a passage as to the duties of the assignee. The Act imposes upon assignees, men for the most part destitute of legal knowledge, the onerous duty of deciding disputes as to the admissibility of evidence, &c., points which often perplex the most experienced Judges. This part of the bankrupt system we cannot help regarding as highly dangerous. Assignees possess the most extensive powers. They may be guilty of the most arbitrary acts, and there is hardly any way of controlling them, and in any dispute in which they may be involved, they will generally have the privilege of fighting at the expense of the estate.

Page 99, Mr. Girouard considers the question whether there is a right of appeal from a Judge's order. Under the ordinary statutory law an appeal lies "from any judgment of the Superior Court." Is a Judge's order under the Insolvent Act equivalent to a judgment of the Superior Court? Since the publication of Mr. Girouard's work, this question has been decided in the affirmative by the Court of Review in the case of Johnston v. Kelly, reported in the present number.

Mr. Girouard (P. 100) finds fault with the delays granted to insolvents, it being in their power to extend the time for the first meeting of their creditors. Even the most insignificant notice must be published for two weeks, and the notice to file claims for two months.

Page 120, the commentator points out that there is no punishment provided in case the insolvent covers up fraudulent transactions by making away with his books. P. 127, the opinion is expressed that the action *en séparation de corps et de biens* does not require to be advertised like the action *en séparation de biens*, and that this unnecessary publicity will prove a source of pain to the injured wife.

P. 129, Mr. Girouard thinks the wife may be made a witness against her husband under the following clause, "any other person who is believed to possess information respecting the estate or effects of the insolvent, may also be from time to time examined before the Judge upon oath."

Such are some of the points noticed by Mr. Girouard in the course of his commentary. His conclusions are strongly adverse to the new law. He says it is easy to perceive that the Insolvent Act is incomplete and prejudicial to the commerce of the country in general. It opens new doors to fraud, and affords to the bankrupt new means of deception. Moreover, Mr. Girouard thinks that this, like every other bankrupt law, will injure our credit abroad. Canada cannot placard her losses and failures without creating mistrust in the mind of foreign exporters and manufacturers. "Finally," he says, "we think we do not stretch the truth in affirming that a large number of merchants would be satisfied with a few amendments and simple additions to the existing laws, for the sole purpose of defining and punishing fraud and giving to the *cession de biens* its proper and necessary effects. Let the Legislature, by rigorous enactments, endeavour to banish fraud; and in order to do so, let it introduce the presumptions of fraud consecrated by the code of the commercial nations of Europe; let it require from each trader the keeping of regular books of account and authorize the seizure of the same, let it strike without mercy at *séparations de biens* and frandulent commercial partnerships—the two great plagues of our trade; let it force the *marchande publique* to carry on business under her own name and not under that of her husband, &c."

To a considerable extent we must concur in the foregoing remarks. The Insolvent Act does not appear to have fulfilled the expectations that were formed of it, and a growing dissatisfaction exists in the mercantile community. It will be curious hereafter to observe what dividends have been paid by estates that have fallen into the hands of official assignees. Cases have been brought under our notice where the insolvent would gladly have compounded for 2s. 6d. or more, and yet no dividend has ever been declared by the official assignee. Some of the defects have been remedied by the Bill passed last Session, and the expense of advertising has been materially diminished. Nevertheless we think very important amendments must yet be made, otherwise the day can not be far distant when the expediency of entirely abolishing the Act will be discussed in our Boards of Trade, and in our Legislature.

ADMINISTRATION OF JUSTICE.

This is the title of an anonymous letter which appeared in the *Minerve* on the 21st September last, over the signature "*Quelques Avocats Courageux.*" As this communication attracted considerable attention at the time of its appearance, it may call for a passing notice in a journal devoted to legal subjects, however the propriety of publishing such letter may be questioned. The point which the writer of the letter ap-

parently labours to establish is that through the indolence of some of our judges and the natural infirmities of others, the business of our tribunals has been seriously impeded. He points to the docket of the Montreal Court of Review, on which, in less than a year, the cases have already accumulated to an alarming extent, and expatiates upon the disasters which are thence likely to result to litigants. The correspondent of the *Minerve* also remarks that numerous cases heard by the Court of Appeals have been allowed to remain *en délibéré* from term to term.

Now it may be observed that the judges referred to in the letter have been among the most able and distinguished members of the Bench, and it is the fault of the Legislature if adequate provision has not been made for their honourable retirement from the fatigues of official duty, when growing infirmities and declining health so justly entitle them to repose. As to arrears of business, it is difficult to pronounce any judgment. Human nature is alas but too prone to procrastination, and the occupants of the Bench are not exempt from the common weakness. We have, it is true, occasional bright examples of judges making determined efforts to sweep away arrears. The last Lord Chancellor was able to state on his retirement that not a single case remained to be judged. The late Mr. Justice Story, when compelled by failing health to retire from the Bench, resolved to clear the docket of his Circuit Court, that his successor might enter on his duties without any arrear. The effort, however, in the opinion of his biographer, cost him his life.

That the increasing work of this District demands more assistance can now hardly be denied. The Court of Review has occasioned, and will continue to occasion, a large amount of extra judicial labour. To be thoroughly efficient, moreover, there should be judges enough for this Court to allow three to sit exclusive of the judge who rendered the decision, the revision of which is demanded. Some attention must also be paid to bankruptcy proceedings. Under these circumstances we heartily concur in the recommendation of the *Minerve's* correspondent, that at least two extra judges be forthwith appointed to be resident in this city.

LAW JOURNAL REPORTS.

COURT OF QUEEN'S BENCH—APPEAL SIDE—JUDGMENTS.

(*September Term*, 1865.)

MONTREAL, Sept. 8, 1865.

PRESENT: Chief Justice DUVAL: Justices AYLWIN DRUMMOND and MONDELET. (Mr. Justice MEREDITH sat in the cases reported below, but was unavoidably absent when judgments were rendered.)

DUPONT *et al.*, (defendants *en garantie* in the Court below) appellants; and GRANGE (principal plaintiff in the Court below) respondent.

HELD—That an *action en declaration d'hypotheque* is a real action, and comes under the class of actions which may be appealed from the Circuit Court, though the sum demanded be less than $100. C. S. L. C., Cap. 77, Sec. 39.

This was an appeal from a judgment of the Circuit Court of Soulanges County. An action *en déclaration d'hypothèque* was brought by the respondent against O. F. Prieur who called in the defendants as his *garants*, and they pleaded to the principal action. The amount claimed being only $77, there arose in the first place the question whether there was any right of appeal. The defendants contended that the case should be put on the *rôle* of appealable cases. This motion was rejected by the Court, and judgment rendered in plaintiff's favor for $50 principal, and two years' interest, along with the current year. From this decision the defendants instituted the present appeal.

DUVAL, Ch. J., said a principle of law of great moment was to be decided in this case. The action being for less than $100 the right of appeal was denied. The answer to this was that there was a *hypothèque*, and it was pretended that this *hypothèque* was a realty. Mr. Justice Meredith and himself dissented from the judgment on the ground that the *hypothèque* was simply an accessory, given for the security of the debt. In his opinion the accessory did not differ from the principal. In one of his earlier treaties, Pothier said that the hypothec was a *jus in re*, but subsequently, with his usual accuracy, he corrected this, and laid down that the hypothec was merely a *jus ad rem*. Marcadé was of the same opinion. The majority of the Court, however, were of opinion that the hypothec was a realty, and therefore maintained the appeal, and reversed the judgment of the Court below.

MONDELET, J., pronounced the judgment of the Court of Appeals, reversing the judgment of the lower court, the principal reason being that the *action hypothecaire* was held to be a real action.

AYLWIN, J., remarked that the principle on which he based his judgment was that in the event of there being a *délaissement*, the subsequent proceeding would undoubtedly be a real proceeding.

DRUMMOND, J.—When there is a property in question, that gives character to the action.

Judgment reversed, Duval C. J., and Meredith J., dissenting.

Moreau, Ouimet and Chapleau for Appel

lants; Doutre and Doutre for Respondent.

GRAND TRUNK RAILWAY, (opposants in the Court below), Appellants; and EASTERN TOWNSHIPS BANK, (plaintiffs contesting in the Court below), Respondents.

HELD—That in Canada the rolling stock of the Grand Trunk and other Railways forms part of the realty, and is not liable to seizure and sale under execution.

This was an appeal from a judgment of the Superior Court, Montreal, dismissing an opposition fyled by the appellants under the following circumstances:—The Eastern Townships Bank sued the Grand Trunk Company on a promissory note for $2,568, dated 1st Feb., 1862, and obtained judgment, 1st Dec., 1862. In January, 1863, execution *de bonis* issued, and a locomotive was seized. To prevent the sale of this locomotive the Grand Trunk Company fyled an opposition *afin d'annuler*, reciting the provisions of the 25th Vic., cap. 56, and claiming the benefit of the Act. The provisions of this Act appropriate towards payment of the debts due by the Grand Trunk, other than bond debts or notarial mortgages, "all monies to be received by the Company from the Province and from the Imperial Government for postal services, and for the conveyance of troops or military stores and munitions of war." The opposition alleged that this Act had been duly accepted and consented to by the necessary number of the bond and shareholders of the Company, at a meeting held in the London Tavern on the 8th August, 1862; that the opposants had not received from the Province the monies earned by them for postal services, and the amount was in dispute between them and the Canadian Government; that the debt claimed by plaintiff was a debt due them before and at the time of the passing of the Act. For the payment of this debt, the opposants said the Bank had no other right than to receive their dividend of the monies or bonds authorized to be issued and appropriated under the Act, and to the balance in 4th preference stock, under the 24th section of the Act. The opposants further alleged that the rolling stock formed part of the road, and was not liable to seizure: that the earnings of the Company were the only assets available to the creditors—first deducting working expenses—but that plaintiffs and other creditors were excluded by the Act from sharing in such balance of earnings. The rolling stock was alleged to be necessary for the working of the road, and mortgaged in favour of the 1st and 2nd preference bondholders to an amount exceeding £8,000,000 stg., and also in favour of the Province. Even if the rolling stock were liable to seizure, it could not be sold unless by consent of the privileged creditors, to whom the proceeds of sale must go. The Company prayed *acte* of their offer to pay in money, bonds and 4th preference stock, with reserve to take other conclusions as soon as the amount due by the Province was finally adjusted and paid. The Bank made answer to this by denying that the Arrangements Act had ever been carried into effect, the consent of the required three-fourths majority not having been obtained. As to the rolling stock being pledged to other creditors, the plaintiffs said that these creditors were not before the Court, and the question of their rights could only be raised by themselves. The opposition having been dismissed in the Court below, the Grand Trunk Company appealed.

DRUMMOND, J., after reviewing the pleadings, observed that the first point—as to the required number of the creditors having assented to the Act—was the point mainly insisted upon at the argument. The other ground, as to the rolling stock forming part of the realty of the road, was barely touched upon. This, however, was the great point, and it was upon this that the decision of the Court would rest. As to the first question, he believed the Company had done something to comply with the Act, but what had been done was done in the very unprofessional—he might almost say slovenly—manner, characteristic of the style in which the business of the Company had been conducted. The professional gentlemen acting for the Company in England had got up papers that were not proper proof of so important a matter. But the Court was called upon to apply the great principle, that in Canada the rolling stock of Railways formed part of the road, and was not liable to seizure. It was true also that this property was mortgaged in favor of other creditors, and even if it could be seized and sold, the proceeds must go to them. But the Court did not consider the question of the property being mortgaged at all. They held that the property was *immeuble par destination* and could not be sold off piecemeal. The law did not allow it, and the law was in this instance perfectly in accordance with reason, with justice, and with sound policy. The locomotive seized in this case was part of the realty of the Grand Trunk Company, and could no more be seized separately than the vats in a brewery, or the burr stones in a mill.

AYLWIN, J., while concurring in the judgment, was of opinion that the Court below was right as to the first point, the certificate of the creditors' consent, produced by the Company, being in his opinion wholly insufficient, and absolutely null and void.

DUVAL, C. J.—The judgment is based upon the ground that the locomotive forms part of the realty. The Court gives no opinion as to whether the Company has complied with the requirements of the law. His honor believed the locomotives formed a part of the road just as much as the wheel formed part of the coach. The fact of an article admitting of being removed was no argument against this. The keys of a house, for example, might easily be taken away, and yet belonged to the house. As to the consent of the creditors, there appeared to be some negligence or clerical blunder in the papers. Matters of this kind, however, were too important to admit of clerical blunders. But fortunately for the Company, the Court pronounced no opinion on this question.

The Chief Justice then observed that Mr. Justice Meredith had requested him to state that he did express an opinion that there was

ample proof in the record of the requirements of the Arrangements Act having been fulfilled, and that he had prepared a written judgment to this effect.

MONDELET, J., observed that the Court was not called upon to decide whether the Company had obtained the required consent.

DRUMMOND, J., added that he did not wish it to be understood from his previous remarks that he pronounced an opinion that the Company had *not* complied with the Act.

Judgment reversed unanimously, and opposition of Grand Trunk maintained.

Cartier and Pominville for Appellants; A. & W. Robertson for Respondent.

SINCLAIR, *et al.*, (plaintiffs in the Court below), appellants, and HENDERSON *et al.*, (defendants in the Court below), respondents.

HELD—That the giving of a promissory note by an insolvent to one of his creditors, for the purpose of inducing him to sign a deed of composition, is a fraud upon the other creditors, and such note cannot be made the ground of an action against the insolvent.

In this case the question arose whether a note given by an insolvent to one of his creditors, for the purpose of obtaining his signature to a deed of composition, can serve as ground for an action. In June, 1861, the defendants became insolvent. A deed of composition was drawn up, in which they bound themselves to pay their creditors 7s. 6d. in the £, by three instalments in six, twelve, and eighteen months, for which instalments they gave their promissory notes, endorsed by Hon. L Renaud. One of the creditors, Mr. John Sinclair, refused to sign the deed of composition. His claim was $1,123.76, and it was not till the defendants had given him a note for 2s. 6d. in the £ extra that he agreed to sign. This note was for $140.50, payable in two years. When the note came due, it was protested for non-payment, and subsequently endorsed over to Sinclair & Jack, (the first named being a son of Mr John Sinclair) for $75 consideration. It was on this note that the present action was based. The defendants pleaded that by the deed of composition, dated 2nd July, 1861, Mr. John Sinclair agreed to take 7s. 6d. in the £, which composition had been paid. The note bore date 13th June, 1861, a date antecedent to the date of the composition. The plaintiffs answered that the deed was not dated till completed, but that Mr. Sinclair signed before the note was given, and that he did so only on the the express assurance that he was to be paid the 2s. 6d. in addition to the amount of the composition. The Court below sustained the plea, and dismissed the action.

DUVAL, Ch. J., said that by all laws the transaction in question was considered a fraud upon the creditors, giving rise to no action whatever. The English authorities put it upon the broad ground of being a fraudulent act. It had been stated that previous to the Code Napoleon this was not the law in France. This was not correct. The Court entirely concurred in the judgment of the Court below.—Judgment confirmed unanimously.

John Popham for Appellants; Leblanc, Cassidy and Leblanc for Respondents.

CORPORATION OF THE PARISH OF ST. LIBOIRE, (plaintiffs in the Court below,) appellants, and GRAND TRUNK COMPANY, (defendant in the Court below,) respondents.

HELD—That the Grand Trunk Railway Company are not bound by law to construct bridges over points where their track crosses Municipal roads opened after the completion of the Railway.

This was an appeal from a judgment of the Superior Court at St. Hyacinthe, pronounced by Mr. Justice Badgley, dismissing the plaintiffs' action. The question was whether the Company were bound to construct a certain bridge. The railroad crossed a parish road, and the *procès-verbal* ordering the opening of the road, ordered the Company to make a bridge over it of sufficient height to allow the cars to pass underneath. The Corporation alleged that the Grand Trunk had constructed a bridge which terminated on private lands, so that the inhabitants of the parish could not cross the bridge without trespassing on these lands. The parish accordingly brought an action asking that the Company should be ordered to make another bridge, or pay $500, the estimated cost of construction

The defendants excepted on several grounds. They said they must be put *en demeure*, by an Inspector, to do the work, and that the parish could not claim the cost before the work was done. Further, that they could not be called on by law to do such work; that the *procès-verbal* was null, and at most should only have ordered defendants to pay their share of the work in proportion to the value of their property in the parish. Further, that they had made a sufficient bridge, and that the road in question had been opened several years after the track was laid.

The action was dismissed on the ground that the bridge, being a public bridge, should not be made at the sole expense of the Railway Company, but should be contributed to by all proprietors in the Parish. From this judgment an appeal was taken on the ground that the Railway Company were bound to make bridges over crossings, and that they had acknowledged their liability by making one which was insufficient.

DUVAL, C. J.—The opinion of the Court is that there is no law or statute which imposes upon the Grand Trunk any obligation to make a bridge, as the plaintiffs pretend.

Judgment confirmed unanimously.

Dorion & Dorion for Appellants; Cartier & Pominville for Respondents.

CHRISTIE, (defendant in the Court below), appellant; and MONASTESSE, (plaintiff in the Court below), respondent.

Question as to the existence of a servitude, *droit de passage a pied et en voiture*, over defendant's land. Held, that the servitude existed, and that defendant had not kept the passage in good order.

This was an appeal from a judgment rendered by Mr. Justice Loranger in the Superior Court at Montreal, 30th April, 1864. The parties were neighbors in the parish of Contrecœur, and there existed on their properties a reciprocal right of way for vehicles and for persons on foot. The action (*action confessoire*,) was

instituted for the purpose of making the defendant acknowledge this right of passage, and maintain the road in good order, the plaintiff claiming moreover £100 damages. The servitude was established by the predecessors of the parties to the action by notarial deed. The defendant denied that there was any right of passage. He pleaded that no title had been produced by plaintiff; that if the latter had any right at all it was a simple right of way, and he, defendant, had never opposed this right of way. The Court declared that the servitude existed, and ordered the defendant to pay $10 damages.

DUVAL, C. J., said the evidence was very positive in favor of plaintiff as to the condition of the road. It was in very bad order. The Court was also of opinion that plaintiff possessed the right of passage, and that defendant was bound to keep the road in order, which he had neglected to do.

Judgment confirmed unanimously.

Doutre & Doutre for Appellant; Senécal, Ryan & DeBellefeuille for Respondent.

MORRISON *et al.* (defendants in the Court below), appellants; and DUCHARME (plaintiff in the Court below), respondent.

A question as to plaintiff's liability for deteriorations of a Church constructed by him. Held, that the defendants, by receiving the work over, had exonerated the plaintiff from all liability, except the liability which by law attached to him as architect and undertaker; and that the defendants had failed to prove the existence of any *vice du sol* or of *construction* for which the plaintiff could be held liable as such architect or undertaker.

This was an appeal from a judgment of the Superior Court, 30th April, 1864. The plaintiff claimed £306 due under a contract. The defendants were the syndics duly elected to superintend the construction of a church and sacristy in the parish of St. Gabriel de Brandon, and they contracted with plaintiff, 29th March, 1855, to erect certain buildings to be completed 25th December, 1856. The price was £1893.10, payable in instalments. When the work was finished, 25th August, 1858, *experts* were named by the parties to examine it, and on their report, the church and sacristy were accepted and taken over, and the contractor absolved from further liability, with the exception of the guarantee of ten years, or his liability as architect and undertaker. The syndics afterwards, however, refused to meet the instalments as they came due, alleging that they had subsequently discovered defects in the building, that there were various cracks and fissures in the walls, which they said were caused by the improper construction of the foundation; that there were holes in the belfry which allowed the snow and rain to penetrate; that part of one of the walls of the sacristy was on the point of falling, &c., and they claimed £2,000 damages as a set off to plaintiff's demand. The pleas of defendant were dismissed in the Court below by Mr. Justice Smith, and judgment given in plaintiff's favor. The defendants appealed.

DUVAL, C. J., said the Court was of opinion that the judgment of the Court below was quite right. Two persons had made a careful examination of the building, and were of opinion that the defects complained of could have been remedied at first for a few dollars. No objection was made by defendants till a long time after. The contractor had done his work properly, and fulfilled the contract.

Judgment confirmed unanimously.

Lafrenaye and Armstrong for Appellants; Rouer Roy, Q.C., for Respondent.

MARTIN *et al.*, (defendants in the Court below), appellants; and MACFARLANE, (plaintiff in the Court below), respondent.

An action for the amount of a note given in excess of the amount of composition. The defendants pleaded, by *exception peremptoire*, that the note was given before the composition notes and was postdated by plaintiff; and that if it were paid, the plaintiff would receive more than the other creditors. Held, that this plea was no answer to the action.

This was an appeal from a judgment rendered by the Superior Court at Montreal on the 31st May 1864, condemning the defendants to pay the plaintiff the sum of $193.48, amount of a note bearing date 1st February 1862, payable 21 months after date. The defendants pleaded specially that by notarial deed dated 1st Feb. 1862, they made an arrangement with their creditors, including the plaintiff, by which they agreed to compound for ten shillings in the £. That at the date of this composition, plaintiff was in possession of the note sued on, which he had postdated. That if this note were paid the plaintiff would receive more than the other creditors, and equality between them would be destroyed. For these reasons the defendants prayed for the dismissal of the action.

Judgment was rendered by Mr. Justice Smith condemning the defendants to pay the amount on the following grounds: 1st, that defendants had failed to prove that the note sued on was given to plaintiff before the execution of the deed of composition; and 2nd because defendants had not set up any agreement by plaintiff to take the note with the fraudulent intention of inducing the other creditors to sign the deed of composition, but they simply stated that plaintiff thereby received more than the other creditors, which was no answer to the action.

DUVAL, C. J., said the peremptory exception was no answer to the action. There was an important omission to allege fraudulent intent. On this principle, they held the judgment of the Superior Court to be correct.

Judgment confirmed unanimously.

C. & F.-X. Archambault for Appellants; S. Bethune, Q C., for Respondent.

BOVE (defendant in the Court below), Appellant; and MCDONALD *et al* (plaintiffs in the Court below), Respondents.

HELD—That the endorser of a promissory note, tendering the amount to the payee, does not require, and cannot demand any special subrogation, besides the surrender of the note. Further, that the endorser cannot throw upon the payee refusing tender of the amount, the liability for the maker's insolvency unless he have renewed the tender *en justice*.

This was an appeal from a judgment of the Superior Court at St. Johns, in the district of Iberville, 27th Nov., 1863, condemning the defendant to pay plaintiffs the sum of £100, with

interest and costs. The action was brought against the defendant as the universal legatee of one Tugault, who had specially endorsed a note for £100, dated 29th May, 1854, made by Raphaël Chéné and Olivier Hebert in favor of the plaintiffs, payable eight months after date. The defendant pleaded an *exception péremptoire* that Tugault, fearing the insolvency of the makers of the note, tendered to plaintiffs on the 25th Aug., 1856, the amount then due on said note in capital and interest, on condition that plaintiffs should subrogate him in all their rights with respect to said note, and at the same time surrender the note; that plaintiffs had absolutely refused to accede to this demand; that the makers of the note were solvent at the date of the tender, and afterwards became insolvent; and thus in consequence of plaintiffs' refusal, he, Tugault, had lost all recourse against the makers whose insolvency had become complete. The prayer of the plea demanded the dismissal of the action. The answer of Edward MacDonald, one of the plaintiffs, to whom the tender was made, was: "I am ready to receive the amount of this note, but I am not willing to sign any document without taking advice." The judgment of the Court below maintained the plaintiffs' action on the following grounds.—1st, That defendant had failed to prove that at the time of the tender the makers of the note were solvent, and had subsequently become insolvent. 2nd, It was not proved that plaintiffs refused to accept the tender. 3rd, That before taking advantage of plaintiffs' alleged refusal, Tugault should have renewed his tender *en justice*, which he had failed to do.

DUVAL, C. J., considered the judgment of the Court below right. As to the subrogation demanded there was nothing to subrogate. All the plaintiff had to say was, this is a simple promissory note, pay me and I will give it to you. The judgment must be confirmed with costs.

Judgment confirmed unanimously.

Belanger and Desnoyers for Appellant; Bethune, Q.C., for Respondents.

JANE GIFFIN, (defendant in the Court below), Appellant; and ANATHALIE LAURENT, (plaintiff in the Court below), Respondent.

Question of evidence only, as to whether defendant's son acted for himself, or as agent for his mother.

This was an appeal from a judgment of the Superior Court, rendered by Mr. Justice Loranger on the 30th April 1864, condemning the appellant, widow of Henry Duncan, to pay the respondent, widow of David Laurent, the sum of $863, balance of account for goods sold and delivered. The plea was that none of the dealings referred to in plaintiff's account had reference to any business carried on by the defendant, but were solely about the business of John Duncan, her son, who had no authority to deal with plaintiff as agent of defendant. The plaintiff answered specially that the defendant's son acted as her agent under Notarial power of attorney, and bought and received the goods for defendant's benefit. This pretension was sustained by the Court below, and defendant appealed.

DUVAL, C. J., observed that it was entirely a question of fact. The transactions certainly commenced between the deceased Laurent and the husband of the appellant. There could be no doubt that the debt was first contracted by Duncan deceased. After his death the widow gave a power of attorney to her son to continue the business commenced in the name of her husband. In view of these facts alone the widow must be held responsible for her husband's debt. But there was a fact which threw some doubt upon the subject. In the books of the deceased, the name of young Duncan was found as the debtor. The bookkeeper, however, explained this by saying that Mr. Laurent never saw this entry; it was made by the clerk himself without receiving any instructions from Mr. Laurent. Under the circumstances there could be no doubt that the plaintiff had a right to claim the amount of the account from the widow. The judgment must therefore be confirmed.

Judgment confirmed unanimously.

A. & W. Robertson for appellant; S. Rivard for respondent, and E. Barnard, counsel.

DOUTRE, *es qualité*, (defendant in the Court below), appellant; and WALSH, (plaintiff in the Court below), respondent.

The respondent, a tenant, asked for the resiliation of a lease on the ground that the house was damp and and not habitable on account of water in the cellar. Held, that this was not good ground for resiliating the lease, inasmuch as the tenant was aware that there was water in the cellar at the time he entered into possession, and nine months subsequently he gave notice that he would keep the house another year.

By the judgment appealed from, rendered in the Circuit Court, at Montreal, on the 29th April, 1865, the plaintiff obtained the resiliation of a lease entered into with defendant on the 10th May, 1864. By this lease the plaintiff rented from the defendant for one year from 1st May 1864, with right to continue the lease for a second year on giving three months' notice previous to the expiration of the first year, a two story stone house at Cote St. Louis. When the plaintiff entered into possession of the premises, in the month of May 1864, there was a small quantity of water in the cellar, but Mr. Daoust, defendant's brother-in-law, who had been occupying the house, having informed him that this would soon disappear, plaintiff did not hesitate to take possession. During the following autumn the water again appeared in the cellar and remained several days. But the plaintiff believing that this water only entered accidentally, did not give the defendant the required notice to terminate the lease, and the absence of such notice caused the lease to run for another year. On the 16th March following, the water entered the cellar to a depth of about four feet. The plaintiff thinking it would disappear, allowed several days to elapse; but finally, seeing it remain, on the 28th March he protested defendant, calling upon him to make a drain, or devise some other means of carrying off the water. The defendant declining to accede to this demand, on the

17th April, 1865, the plaintiff brought an action to resiliate the lease, on the ground that the house was uninhabitable by reason of the water and dampness. Defendant pleaded that the plaintiff, when he leased the house, was aware that there was no sewer to drain the cellar; that there was water in the cellar in the spring of 1864, and also in the following autumn, yet plaintiff had given no notice to terminate the lease. It appeared, moreover, that on the 6th Feb., 1865, plaintiff informed defendant that he was not going to keep the house another year. Thereupon defendant entered into negotiations with other parties, and was about to let the house when plaintiff came to him and said he had changed his mind, and would keep it. The lease being resiliated by a judgment rendered by Mr. Justice Badgley, the defendant appealed.

DUVAL, C. J., observed that the evidence of the plaintiff showed that he had first declined to continue the lease, and then told defendant he had changed his mind and would keep the house. It also appeared that one Troutbeck had been anxious to get the house, and would have rented it had not the plaintiff retained possession. It was also proved that plaintiff, before he leased the house, saw the water in the cellar, and was informed by Mr. Daoust that there was no drain to carry it off. Under these circumstances the plaintiff was not entitled to demand the resiliation of the lease, and the judgment must be reversed.

Judgment reversed unanimously.

Doutre and Doutre for Appellant; Leblanc, Cassidy and Leblanc for Respondent.

PATRICK KIERNAN (plaintiff contesting the opposition of Francis Kiernan in the Court below), Appellant; and FRANCIS KIERNAN (defendant and opposant in the Court below), Respondent.

A lot of land was donated by a father to a son, to provide him with means of living, with the condition that it was not to be alienated or hypothecated during the donor's lifetime. Judgment setting aside a seizure of this land by the father confirmed, but on the ground that his claim had been satisfied.

The appellant in this cause, father of the respondent, complained of a judgment of the Superior Court, rendered by Mr. Justice Smith, maintaining an opposition to the sale of certain land seized by the appellant. This land was given to the respondent by the appellant by deed of donation 9th May, 1843, "to procure him the means of obtaining an honest living, and that the said respondent should not, during the lifetime of him, the said appellant, sell, alienate, or hypothecate the said land or farm." In 1846, the father and son had a lawsuit respecting work done for each other, and a judgment was obtained 25th April, 1848, in favor of the present appellant for £10 3s. 11d. debt, and £38 18s. 3d. costs. Execution having issued, a return of *nulla bona* was made. At this time the son paid his father £15 on account of the judgment; he also did certain work for him, and leased a farm for which he paid a rent in oats. Respondent contended that the judgment was wholly extinguished and compensated by adding these amounts together. On the 29th Nov., 1862, fourteen years after, the appellant, under an execution *de terris*, caused the land to be seized which he had donated to his son in 1843. To this seizure respondent fyled an opposition, setting forth the above facts, and also attacking the seizure itself on the ground of informalities. The opposition was maintained in the Court below on the ground that the property was *insaisissable*, the donation being made on the condition that the donee should not sell, alienate or hypothecate it during the donor's lifetime. From this judgment the plaintiff appealed, contending that this condition in the deed of donation could not prevent the donor himself from seizing it in satisfaction of a judgment.

DUVAL, C. J., was of opinion that the judgment must be confirmed, on the plea of compensation. There were two points; first, that the property was insaisissable. When the father stipulated that the land was not to be alienated, he stipulated in favor of himself. Second, the plea of compensation. This appeared to be sustained by the evidence.

Judgment confirmed unanimously.

Dorion and Dorion for Appellant; C. S. Burroughs for Respondent.

OUELLETTE, (defendant in the Court below), Appellant; and BADEAUX, (defendant in the Court below), and FAUTEUX and MACFARLANE (intervening in the Court below), Respondents.

An action for salary, the employer being insolvent. Held, that a tender of the arrears due, together with one month's salary after the time plaintiff ceased to be employed, was sufficient, though he was engaged for a year, of which four months had not expired.

The plaintiff was engaged as clerk to Mr. P. B. Badeaux, for one year from 1st May, 1860. In December, 1860, Mr. Badeaux became insolvent, and Messrs. Fauteux and Macfarlane were appointed assignees to the estate. The plaintiff left the service of the insolvent in the beginning of December, 1860, and there was then due to him the sum of £8 4s. 8 l. On the 31st December, he took out a *saisie-arrêt* before judgment, against the effects of the insolvent, for the sum of £60 6s 4d., viz: £8 4s. 8d. arrears, and the four months next ensuing up to the end of the year's engagement. The assignees intervened, and on the 2nd Jan. 1861 tendered to plaintiff the £8 4s. 8d. arrears, and £10 8s. 4d, for one month after, together with the costs incurred. This tender was subsequently renewed with the plea, and the money deposited. The judgment of the Court below, rendered by Mr. Justice Monk 31 May 1861, held the tender to be sufficient, and condemned plaintiff to pay all costs incurred after the tender was made. From this judgment he appealed.

DUVAL, C. J., remarked that this was an action for salary. There was an action for salary, and there was also an action *en dommages*. The judgment of the Superior Court, giving plaintiff his salary up to the time he ceased to work, was correct. Plaintiff had no right to ask for more.

Judgment confirmed unanimously.

Leblanc & Cassidy for appellant; Laflamme, Laflamme & Daly for respondents.

GIRARD (defendant in the Court below), appellant; and HALL, *et al.*, [plaintiffs in the Court below], respondents.

Deed of composition set aside on proof that the creditors were induced to sign by fraudulent representations.

The defendant in this case was a trader doing business at Verchères. In January 1862, he asked his creditors to accept a composition of 5s. in the £. This was refused, and he finally offered 10s. in the £, which was accepted. Subsequently, however, some of the creditors learned that the sale of the defendant's immoveable property was simulated, and also that certain transfers of sums due him were made for the purpose of defrauding his creditors. On hearing this, the plaintiffs, who had signed the deed of composition, took out a *saisie-arrêt* for the remaining 10s. in the £, which had not been paid. Judgment was rendered by Mr. Justice Loranger on the 30th April 1864, maintaining the *saisie-arrêt* on the ground that the defendant had obtained the execution of the deed of composition by fraud, and therefore he could not derive any benefit from it. The defendant then brought the present appeal.

DUVAL, C. J., said unhappily there was no doubt as to the fraud attempted by the defendant. His books of account disappeared and he said they had been burned by his son. Now it was proved that these books had not been burned. The Superior Court was perfectly right in declaring that the composition was null.

Judgment confirmed unanimously.

Dorion & Dorion for appellant; M. E. Carpentier for respondents, and E. Barnard, Counsel.

TAYLOR, [opposant in the Court below], appellant; and BUCHANAN *et al.*, [plaintiffs in the Court below], respondents.

A question as to title of the Portuguese Jews to certain land adjoining that formerly used as a Jewish Cemetery, claimed as forming part of the McTavish estate.

This was an appeal from a judgment dismissing an opposition under the following circumstances. In November 1861, the plaintiffs issued an execution against the "Corporation of Portuguese Jews of Montreal," and seized certain land in the St. Antoine suburb. This land was said to have been acquired by the late David David 31st August, 1797, being part of that left by him to be used as a Jewish burying ground. Some days before the sale, the present appellant fyled an opposition based on two grounds: 1st, a deed of sale by the succession McTavish to Messrs. Fisher and Smith 21st December, 1848, a deed dated 26th Aug., 1845, granting to appellant a third of the McTavish property, and a *partage* of this property on the 23rd August, 1856; 2nd, opposant alleged a possession for thirty years openly and publicly. The plaintiffs replied that defendants had possessed the property for sixty-six years. Judgment was rendered by Mr. Justice Berthelot on the 30th June, 1863, dismissing the opposition for want of proof. It was from this judgment that the opposant appealed.

DUVAL, C. J., said this was a contestation between the appellant, as representing the estate McTavish, and the respondents, on the part of persons claiming land purchased by the late Mr. David for the purpose of forming a Jewish Cemetery. It was contended by the appellant that this property formed part of the McTavish estate. The Court did not think that it formed part of the estate, but that it formed part of this Jewish burying ground. It was true that there was no fence, for the Jews, not requiring the whole of the ground as a cemetery, did not wish to go to the expense of renewing the fence. But the posts were still visible, and the fact of the fence having disappeared, gave the appellant no title to property which did not belong to him. The judgment must, therefore, be confirmed.

Judgment confirmed unanimously.

H. Stuart, Q.C., for Appellant; R. Roy, Q.C., for Respondents.

PATOILLE, [defendant in the Court below,] Appellant; and DESMARAIS, [plaintiff in the Court below], Respondent.

HELD—That the father of a minor may bring an action *en déclaration de paternité*, without being appointed tutor *ad hoc* to her.

This was an appeal from a judgment rendered by Mr. Justice Loranger on the 19th Oct., 1864. The plaintiff, as father of a minor daughter, brought an action against the defendant, praying that the latter be declared father of the child to which plaintiff's daughter had given birth, with claims for allowance and damages. The Court condemned the defendant to pay plaintiff the sum of £12 per annum, for the first four years; then £18 per annum till 8th June, 1869, when the mother would attain her majority, with $10 *frais de gésine*. From this judgment defendant appealed on two grounds. 1st, That the action could not be brought by plaintiff in his sole quality of father of the minor. He should be named tutor *ad hoc*. 2nd, That there was no proof that defendant was the father of the child.

DUVAL, C. J., said the Court was of opinion that the judgment must be confirmed. The conduct of the defendant was most disgraceful. He boasted that he made a practice of seducing all the young girls that he came in contact with. The sum awarded was very moderate, and the Court saw no reason to disturb the judgment.

AYLWIN, J., remarked that if the appellant had any character, it was a great pity he ever thought of bringing the case up to that Court.

Judgment confirmed unanimously.

Leblanc, Cassidy and Leblanc, for appellant; Dorion and Dorion for respondent.

CORDNER [plaintiff in the Court below], Appellant; and MITCHELL, [defendant in the Court below], respondent.

Plaintiff leased a house, with a clause prohibiting subletting without his express consent in writing. He'd, that the verbal consent of plaintiff's agent to a sub-lease, and the plaintiff's acquiescence in such sublease during its entire term, was equivalent to a consent in writing.

This was an action to resiliate a lease on the ground that defendant had infringed a clause

prohibiting subletting without the written consent of the proprietor. See 1 L. C. Law Journal, page 28, where the judgment of the Court of Review is reported.

DUVAL, C. J., said that in this case it was quite evident that the plaintiff had forgotten that there was a clause in the lease giving respondent the right of claiming the extension of the lease for two years longer on giving notice to the lessor. Having lost sight of this clause, the appellant sold the property to another party, and it then became necessary to turn out the respondent if he could. What was the ground taken? That there was a clause prohibiting subletting. Respondent had sublet to Dr. David, who had been in possession of the building for two years, and the plaintiff's agent, Mr. Tuggey, had constantly received the rent from him. Plaintiff was perfectly aware of this fact and never made the slightest objection. Defendant was quite right in asking for an extension of the lease if he wanted it.—Judgment confirmed unanimously.

A. & W. Robertson for appellant; S. W. Dorman for respondent.

RITCHIE *et al.*, [defendants in the Court below], appellants; and WRAGG [plaintiff in the Court below], respondent.

Question of evidence. To an action for rent defendant pleaded that no rent could be recovered inasmuch as the house had been leased with plaintiff's consent for the purpose of keeping a disorderly house. Held, that there was no proof of the plea.

For the judgment of the Superior Court rendered by Mr. Justice Monk in this case, see 1 Lower Canada Law Journal, page 29.

DUVAL, Ch. J., said in this case a person pleaded the infamy of his own character. He would hesitate before he allowed such a plea. Pothier said it was no answer to the action. But the Court expressed no opinion on this, because they had another ground. There was no proof whatever of the fact alleged, viz. that plaintiff knew the purpose for which the house was leased. On the other hand, there was the evidence of Mr. Monk, advocate, in whose office the lease was made. Mr. Monk stated that the female defendant represented that they were going to keep a boarding house. The parties appeared perfect strangers to each other, and Mr. Monk considered at the time that Mr. Wragg had got a first rate tenant. This evidence could not be compared with that offered by the defendants coming forward with a declaration of their own infamy. The judgment maintaining plaintiff's action must be confirmed.

MONDELET, J., wished to be understood as not giving any opinion as to the reception of such a plea. From the evidence, it was sufficiently apparent that the two parties did not know each other. His honor did not wish to say that in any case he would refuse to credit the evidence of such a woman as the defendant, nor did he say that he would credit it. It would depend altogether upon the circumstances

DUVAL, C. J., added that in criminal practice it was usual to charge the jury not to give a verdict, where the evidence of the accomplice was not corroborated. He referred to a case in Upper Canada where the dying declaration of a woman did not agree with her evidence at a trial. Judgment confirmed unanimously.

Perkins & Stephens for respondent.

DEMERS, [intervening in the Court below], appellant; and ST. AMOUR *et al.*, [opposants in the Court below], respondents.

Held—That an intervening party tendering to an opposant the amount claimed by his opposition, must also tender the costs incurred by the opposant in a distinct action in another district, instituted for the same object as that for which the opposition was fyled.

This appeal arose in the following manner. On the 25th Nov., 1863, certain immoveable property situated in Grand Ile, Beauharnois County, was seized by one Parent, in satisfaction of a judgment which he had obtained against one Joseph Amiot. The possessor of this property, Amiot, had acquired it from the heirs St. Amour, [of whom the respondents were four] by deed of sale 22nd Jan., 1856, not registered. The part of the purchase money coming to the respondents not being paid by Amiot who was insolvent, the respondents, by an opposition *afin de distraire*, prayed for the rescision of the sale, unless the whole were paid. The appellant, who had a hypothecary claim on the same property, intervened, and tendered opposants the amount of their claim—principal, interest and costs of opposition, with security for the enstalments not yet due. The opposants answered that the tender was insufficient, there being another sum of $48 costs incurred by them in an action taken out against Amiot at Beauharnois for the purpose of setting aside the sale, which sum of $48 had not been included in the tender. The appellant answered that he knew nothing about this sum; it was not mentioned in the opposition, and the tender had been made in exact accordance with the conclusions of the opposition. The opposants replied that the action in question had been taken out after the opposition was fyled; that they had a perfect right to protect themselves, both by opposition and resolutory action. The pretensions of the opposants were maintained in the Superior Court by Mr. Justice Berthelot, and confirmed by the Court of Review. It was from these decisions that the appellant instituted the present appeal.

DUVAL, C. J., rendered the judgment of the Court, confirming the judgment appealed from Judgment confirmed unanimously.

D. Girouard for appellant; Doutre & Doutre for respondents.

Sept. 9th.

LAMERE, *fils et al.* [defendants in the Court below] appellants; and Hon. J. B. GUEVREMONT [plaintiff in the Court below] respondent.

Held—That the petitioners in the case of a contested election are jointly, *not* severally, liable to the sitting member for their half of the Commissioner's fees paid by the sitting member.

This was an appeal from a judgment of the Superior Court, Montreal, condemning the defendants to pay the sum of $490 jointly and severally. This was the amount of the Hon-

Judge Bruneau's account for services as Commissioner, appointed to take cognizance of the contested election of plaintiff as Legislative Councillor for the Laurel division. The plaintiff had paid this account and taken a subrogation of the claim, for which he instituted an action against the defendants and obtained judgment. The defendants raised two points. First, that the Commission being jointly issued at the instance of the petitioners and the sitting member, each of the parties was jointly and severally liable to the Commissioner. Second, that the sitting member having paid the amount to the Commissioner, he had only a right to a contribution from the defendants [Lamère, McNaughton and McCarthy] petitioners, for one-half of the amount so paid, each of the defendants being bound to pay him but one-sixth of the amount, they, in their relation to plaintiff, being joint, and not joint and several, debtors.

DUVAL, C. J., said there was an error in the judgment of the Superior Court. It condemned the petitioners, defendants, to pay the entire amount. This was not correct. The amount must be reduced to $165, being the half of $330, amount transferred, and the condemnation would be jointly, but not *solidairement*. Judgment reformed.

Devlin & Kerr for appellants; Lafrenaye & Armstrong for respondent.

Montreal, Sept. 6th, 1865.

BUNTIN, appellant; and HIBBARD, respondent.

HELD—That an appeal may be had to the Judicial Committee of the Privy Council when the amount involved in the controversy exceeds £500 stg., though the amount actually demanded in the declaration be less than £500.

In this case the judgment was for the sum of $1600, balance of $2800, $1200 having been paid on account before action brought. [See 1 L. C. Law Journal P. 34, where the case is reported.] On a motion made by respondent for leave to appeal to the Privy Council,

DUVAL, C. J., said the judgment of the Court of Appeals set aside the contract, and the plaintiff was ordered to take back his rags, which had been sold for $2800. It was quite evident, therefore, that the controversy was for a sum exceeding £500 stg. On the ground that the judgment expressly set aside the contract, the motion for leave to appeal would be granted.

AYLWIN, J., said he was of a different opinion. The right of appeal depended on the amount of the demand.—Motion granted.

COURT OF QUEEN'S BENCH.

DECEMBER 5TH, 1864.

PRESENT: Duval, Ch. J., Aylwin, Meredith, Mondelet, and Drummond, J.

QUEEN *v.* SAMUEL PERRY.

HELD—That the evidence required by Consol. Stat. Can., Cap. 94, Sec. 26, to corroborate the evidence of an interested witness, cannot be based upon something stated by such witness.

Mr. Johnson, Q.C., for the Crown, stated that the prisoner Perry had been tried on a charge of forgery of a promissory note. The indictment contained two counts. The first charged that the prisoner forged, and the second that he uttered. The name charged to have been forged was Henry Smith. Henry Smith proved so far as he could prove it, that the signature was not his. The prisoner was undefended, and the learned Judge who presided at the trial (Mr. Justice Drummond), reserved the question for the full Court whether the evidence was sufficient to justify a conviction. There was in the first place the evidence of Henry Smith himself, who swore that the signature was not his. The only corroborative evidence was the following: Smith deposed that meeting Perry, he told him the signature was forged. Perry replied "that is no forgery. I saw you sign the note myself one evening that we were at the Cosmopolitan Hotel; a man named Deveau, and another young man were present at the time." The Crown brought up Deveau, and he swore that he had never seen Smith sign the note. Mr. Johnson observed that under cap. 94, Consol. Stat. Canada, sec. 26, no person is to be deemed an incompetent witness in support of the prosecution by reason of any interest which such person may have in respect of any writing, &c., given in evidence, but the evidence of any person so interested shall in no case be deemed sufficient to sustain a conviction, unless the same is supported by other legal evidence.

Mr. Justice Drummond said that he had felt it his duty to reserve this point for the full Bench, especially as the prisoner was undefended. The question was, could Henry Smith, who was only *quasi*-competent as a witness, lay the substratum of the corroborative evidence required by the statute.

The Court took time to consider, but the following (March) term, they unanimously expressed the opinion that the evidence offered in corroboration was wholly insufficient, Deveau merely contradicting something which the interested witness said that the prisoner had said.

SUPERIOR COURT—JUDGMENTS.

MONTREAL, 30th June, 1865.

BADGLEY, J.

EUSTACHE BRUNET *dit* LETANG, *et al. v.* VENANCE BRUNET *dit* LETANG, *et al.*

Notarial Will set aside.—Held, that a will made before a notary and two witnesses under circumstances which rendered it improbable that the testator was in the possession of his faculties, or that the will was dictated by him, cannot be maintained.

This was an action brought by some of the children of Eustache Brunet, the elder, against the other children, claiming their share of the succession of their father. The defendants pleaded that they were in possession of the estate under a will made by the deceased on the 27th of April, 1863, at St. Joachim de la Pointe Claire, before Valois, Notary, and two witnesses. The plaintiff then inscribed *en faux*

against the will, so that the object of the action was in reality to set aside this will.

The case was of considerable interest. The testator married twice. By the first marriage he had two children, and by the second marriage five children, who were all living at the time of his decease. The testator was upwards of seventy-five years of age, and was suffering from throat disease. He was a man who never spoke much; in fact, some of the witnesses stated that he never spoke except in monosyllables, and his taciturnity was not diminished by the throat disease which almost choked him. He had, however, shown ability in making money, the value of his estate being estimated at $60,000. It would appear that the notary, who eventually made the will, exhibited a particular interest in the testator's estate, and urged him upon the subject, and frequently asked him why he had not made a will and settled his estate. On one occasion, before the will was executed, Venance, one of the sons of the second marriage, and who alone lived with his father and mother, the second wife, went to the notary, and told him to come down and make his father's will. The notary went to the house, accompanied by two witnesses, and found the old man lying in such a distressed condition of body that it was impossible to make the will at that time, the witnesses themselves objecting to it, notwithstanding the urgency of the notary, as the testator either could not or would not reply to any of the notary's questions, and the notary was compelled to declare that he could not do it then. Four days after, he was again applied to by Venance, and going back with Venance, he took papers with him and again went to the house with other two witnesses. The notary on entering the sick room, (a miserable apartment not much more spacious than the dimensions of the bed), on which the testator was lying in great agony, inquired of the dying man how he was. To this question there was no answer, or, if there were any answer at all, it was a scarcely articulate "*oui.*" Then the notary informed him that he had come there for the purpose of drawing his will. One of the witnesses said he answered "*oui*" again, after several minutes had elapsed. The notary proceeding to arrange some papers which they supposed was the will, asked the old man how he wanted to dispose of his estate. He replied (according to the evidence,) that he gave to each of his daughters 3,500 *livres ancien cours*. After he had made this declaration, Theodore, another of his sons by the second wife, who, with Venance, was standing at the door near the bed, said, "Celina (one of the daughters) has received 2400 livres (£100) already; that ought to be deducted." The Notary then asked if she was to receive 3,500 livres in addition, and the old man is said to have answered no. This answer was certified by Brisbois, one of the witnesses. Other questions were then put and answered. He is said to have given to Venance an island opposite Pointe Claire; also the residence and emplacement that he owned, indeed the chief and best part of the estate. Having said in one of his answers that he gave it to his son, the notary replied, "you have four sons. There is Eustache, to whom you have given nothing. Do you include him?" The old man seemed confused, and replied that he did not know him. But one of the witnesses said he heard the old man say yes, and the notary said he heard him say to give it to Eustache too. The mind of the dying man was evidently wandering, and he did not remember how many sons he had. After this, there was a discussion with reference to the personal estate, and Venance and the notary are reported to have pacified Theodore with the assurance that his share was safe. Then followed the question among those present as to who should be the executor, and it was agreed that Theodore should act as such.

There was a good deal of contradiction in the testimony, and much of it extremely unsatisfactory, shewing strongly of suggestion to suit the interests of the parties deriving advantage from the will to the exclusion of the others. Another peculiar circumstance was that the order in which the two witnesses swore that the bequests were made differed from the sequence in the will, the order being inverted in the latter, intimating that the will must have been prepared beforehand by the notary at the suggestion of some one not the testator, and the evidence shewing that the marginal notes then written were actually the additions made by the notary, who, as the witnesses said, at each time, wrote a little on the paper. Moreover, the ink with which the marginal notes were written was not the ink with which the will was written, and the ink of the notary's signature also differed from the ink of the body of the will. There was other evidence to shew that the will never could have been made in the house in the manner alleged. None of the witnesses went so far as to state that such was the case. The notary said he was never spoken to by Venance about it, but it was almost certain that he carried it to the house with him, and that it was made according to the instructions of Venance. Taking all the circumstances into consideration, [remembering that the old man was sinking at the very door of death, afflicted with a disease that rendered it almost impossible for him to articulate, and that he died a week or ten days after, the conclusion was that the will was a fabrication, that the inscription *en faux* must be maintained, and the will set aside. *Inscription en faux maintained.*

MARIE ODILE MALO *v.* DEMONTIGNY.

Separation de corps et de biens granted on account of cruelty on the part of the husband.

This was an action *en séparation de corps et de biens*, brought by a lady who had reached the age of fifty-three or fifty-four when she married the defendant. Soon after the marriage, the defendant while inebriated frequently committed acts of violence on the person of his wife, so that she was at length forced to leave the house. She expected to inherit some property from her mother, and brought the present action to secure it from her husband. The

violence proved was sufficient. *Separation granted.*

KERRY *et al. v.* SEWELL *et al*, and SEWELL *et al*, plaintiffs *en garantie*, *v.* SMITH *et al*, defendants *en garantie*. 2nd, LAMPLOUGH *et al*, *v.* the same. 3rd, LYMAN *et al*, *v.* the same.

HELD—That when the article sold turns out to be something entirely different, the sale is null, though made by sample.

These three cases all originated in one transaction, and in each case there was a *demande en garantie* against the same parties. In 1864, Messrs. Smith & McCulloch had a consignment of indigo, which they so called, which they sold to Messrs. Sewell, Wetenhall & Reid. The latter, either personally or through brokers, offered this article to various parties. The first application was made to Messrs. Lyman, Clare & Co., to whom they offered it at forty cents a pound. At that time Lyman & Co. did not want indigo. But five or six days after, Messrs. Sewell & Co. returned with a sample and offered it at thirty-five cents a pound. Tempted by the low price, Messrs. Lyman, Clare & Co. bought four or five parcels. In the case of Messrs. Lamplough & Campbell and Messrs. Kerry & Co., the sales were made by brokers. The sales were made by sample, but there was no examination of the samples at the time by any of the purchasers. The bill of parcels in each case specified the article sold to be indigo. Five or six days after it was found that the article was not indigo at all. Though made up for sale exactly like the real article, it was nothing more than common clay coloured with Prussian blue. There was not a particle of indigo in the whole composition. As soon as this was discovered the purchasers applied to Messrs. Sewell & Co., to take back their goods, and on their refusal to do so, the present actions were brought against them, the defendants in turn bringing actions *en garantie* against Messrs. Smith & McCulloch, from whom they had purchased.

Now it was very true that where goods were sold by sample, and where an examination of the sample was made sufficient for the purpose of enabling the purchaser to be satisfied that the goods agreed with the sample, the purchaser would be held. He had made his examination and could not reject his bargain. But where a merchant professes to sell an article, it must be the article itself. It may be a very inferior description of the article, but it must at least be the article which it is held out to be. It is not enough that it is a mere imitation. If a man intends to buy gold, and receives pinchbeck the sale is of no effect. Pothier laid this principle down very clearly. The parties were entitled to recover the amounts which they had paid for the supposed indigo. Judgment for plaintiffs in all three cases. The actions *en garantie* were defective in form, and must be amended before any judgment could be given. The declaration *en garantie* set out the original sale and then the words of the declaration in the principal action, followed by a prayer for judgment. This was not enough. There must be a substantial allegation that the plaintiffs *en garantie* bought this article from defendants *en garantie*, and that it was not the thing it was represented to be; that they had sold it and were prosecuted to take it back or return the price received. Judgment for plaintiffs, and actions *en garantie* to be amended.

MACBEAN *v.* DALRYMPLE.

HELD—That when a creditor leaves a legacy to a debtor, the presumption is that he intends the amount of the bequest to be paid without deduction of the debt.

This was an action to recover a legacy, brought against the universal legatee of the late Mr. William Skakel. The plaintiff had been for many years a very intimate friend of deceased, and some years before the latter died he advanced ums of money to the plaintiff, amounting t £135. There was no difficulty as to this amount. It was advanced by Mr. Staples for the purpose of assisting the plaintiff to purchase two lots of the McGill College property, and to build a house on them. The will contained the following among other clauses:—

"I will and bequeath to William Macbean the sum of £150, he being my particular friend and a distant relation, to be unto him once paid."

By this will Macbean was also elected one of the executors.

At the time this will was made, Mr Macbean had received from the deceased £135. Mr. Macbean sued for £150, the amount of his legacy, and was met by the plea: "You have already received £135; we tender you £15, the amount required to make up the £150." Plaintiff answered that he was entitled to the £150, besides what he had received, which in fact was not loan to him, but gratuity.

The question was, whether the action was maintainable for the £150 over and above the £135. Whether the deceased was justified in giving the plaintiff £150 was not the question here, but whether the sum bequeathed in the will was to be held paid or to be compensated to the extent of £135 by what plaintiff had received. The presumption that arises when a creditor makes a bequest to a debtor is different from that which arises when a debtor leaves a bequest to a creditor. In the latter case it may be presumed that the legacy is intended to discharge the debt. In the former case it may be presumed the creditor would not give the money with one hand if he intended to demand it back with the other. But in addition to this there was extraneous testimony in the shape of a letter written by deceased to the plaintiff, which showed that the money advanced during his lifetime was intended as a gift, the two persons being on most intimate terms. No receipts had been taken by Mr. Skakel for the £135. The defendant was not an heir at law of him, and had received a large universal legacy. Mr. Skakel died a bachelor.

Under all the circumstances judgment must go for plaintiff for the full amount of £150.

MacKay & Austin for plaintiff; Day & Day for defendant.

FILIATREAULT *v.* MCNAUGHTON.

HELD—That it is not necessary for a person, when offering a builder the balance due him under a contract to reserve his rights of action against the builder in respect to defects in the building. But if such reserve be made, the builder cannot on this account refuse to accept the balance tendered him.

This was an action for a balance due under a builder's contract. Mrs. Adams entered into a contract with plaintiff for the building of a house. When the whole thing was finished, a certain amount was found to be due to plaintiff. Mrs. Adams tendered him the money through M. Labadie, her notary, but with reserve of her rights under certain protests respecting supposed or alleged defects in the building. Now whether she had made this reserve or not was a matter of very little consequence, as she could always exercise the right of action against plaintiff in respect to those matters. Plaintiff declined to take the money under this reserve. The tender was made in American gold pieces, and was not quite so legal as it might have been. But it was clear that the money was ready for him. Under these circumstances judgment would go for the amount tendered, but (as he had refused to receive this money) without costs.

KELLY *v.* MCGEE.—The plaintiff was the owner of certain lots of land in Chatham. Defendant wishing to purchase, they went over the land together, and the defendant being quite satisfied, the deed was drawn. When the present action was brought for the recovery of the amount of the purchase money, defendant pleaded that there was no loghouse upon the land, and that a certain deduction should be made on this account. Now the defendant must have been perfectly well acquainted with this fact from the first.—*Judgment for plaintiff.*

BLUMHART *v.* BOULE; HUBERT, curator.

HELD—That a wife *separee de biens* must be authorized by her husband to make an opposition to a sale; and that the wife's admission that she was not authorized will invalidate the opposition.

In this case the defendant's property being seized under a writ of execution on a judgment, defendant's wife, M. A. X. Archambault, made an opposition in her own name as *separée de biens* from her husband and authorized by him. Plaintiff answered that she never was authorized by her husband. The parties went to proof, and the lady, being brought up, swore that she was not authorized, and that she did not require any authority from her husband. Unfortunately she had thus proved the exception herself. The difficulty was that upon the face of the opposition, the husband appeared to have come in and authorized her. But it was her own opposition and she said she was not authorized. Now an authorization was necessary; the exception would, therefore, be maintained, and the opposition dismissed with costs.—*Opposition dismissed.*

MONK, J.,

SCOTT *v.* INCUMBENT AND CHURCHWARDENS CHRIST CHURCH CATHEDRAL.

HELD—That an architect is responsible for defects in a building erected by him, though the plans were made by another architect before he assumed charge.

This was an action for Architect's commission, &c. There was no difficulty as to the 3 per cent. charged on the bulk of the outlay, but there were other items in the account which the Church authorities disputed. These sums, however, were of little consequence, inasmuch as the plaintiff was liable for want of skill. It was true he built the Church upon the plans of another architect, but it was his duty, as the work went on, to see what he was about. There was no difficulty as to his liability. The damages occasioned by his want of skill might be opposed in compensation, and the action would, therefore, be dismissed.

Ex parte C. GAREAU, for *certiorari*.

HELD—That a conviction for disturbing the public peace, "in premises off McGill Street," does not come under the Statute.

This was an application on the part of the petitioner to quash a conviction by the Recorder for disturbing the public peace "in premises off McGill street," by using insulting language towards Michael Ryan, constable. The petitioner represented that the alleged offence, which he denied *in toto*, was not committed in the public street at all, but merely a conversation that took place in his own store. Ryan had entered the store on the 20th March last, and requested Mr. Gareau to have the ice removed from the side-walk, as his neighbour was getting his removed. Mr. Gareau (who had been notified in the morning of the same day by another policeman to remove the ice, and who thereupon sent his boy out to do so) answered that it was already commenced, and the boy was then at his dinner. The policeman said it was not commenced. Mr. Gareau told him he lied, and then went with him to the door to point out where the job had been begun. It was here that Ryan said he was insulted by Mr. Gareau, but the book-keeper and another person in the store, who were within a short distance, testified that they did not hear Mr. Gareau make use of any insulting language. The Court was disposed to maintain the pretensions of the petitioner. Premises off McGill Street, simply meant a house on McGill Street, and the alleged offence, therefore, did not come under the terms of the statute. The conviction, too, repeated the same thing "in premises off McGill Street." The conviction was therefore bad, and must be quashed with costs.

MASSON *et al. v.* MCGOWAN, and PETER MCGOWAN, opposant.—This was an opposition to the seizure of real estate. The plaintiffs said the opposant had previously put in an opposition to the sale of the moveable property, which opposition was based on a deed which the Court held to be fraudulent. The same deed being made the basis of the present opposition, the plaintiffs pleaded the former judgment as *chose jugée*. The Court was convinced from the evidence that the deed was fraudulent, and the opposition must be dismissed with costs.

ROWAND *v.* HOPKINS.—A question between the plaintiff and the executor. Plaintiff must render the account as prayed for.

BOUVIER *v.* BRUSH *et al.*—This was an action to set aside a sheriff's sale, on the ground that the advertisements were not regularly made. The Court found that the advertisements had been regularly made as required, and the action would, therefore, be dismissed.

JODOIN *v.* FABRIQUE DE VARENNES.—This was an action against the Fabrique. The plea was that it was the building committee on whom the responsibility lay. There was no difficulty in coming to the conclusion that the building committee were not responsible. The party responsible was the Fabrique. Judgment for plaintiff.

HUNTER *v.* GRANT.—There was nothing in this case to shew the connection between the transfer of the *bailleur de fonds* and the account sued upon. Several instalments payable under the transfer were coming due, but at the time the action was brought none of these instalments were due. His Honor was of opinion that the action must be dismissed with costs.

TARRATT *et al. v.* BARBER *et al.*, and TARRATT *et al. v.* FOLEY.—Applications were made in these cases for a *commission rogatoire* to England. The cases had been inscribed for hearing. The inscription in both cases was premature, and the motion to discharge inscription must be granted in both cases.

SERRE *v.* GRAND TRUNK Co.—This was an action for damages. The plea denied that plaintiff had suffered any damage. The parties went to proof, and the plaintiff brought up three or four witnesses, who estimated the damage at a high figure, but spoke in very vague terms of the nature of the damage. When cross-examined it did not appear that they had paid much attention to the place, but simply looked at it as they passed in the cars. The Court was of opinion that there was no damage proved. Action dismissed with costs.

NORDHEIMER *v.* DUPLESSIS.—This was an action *en revendication* of a piano. The defendant said he purchased it at a judicial sale. The fact of a purchase at a judicial sale was clearly proved. Action dismissed with costs.

COURT OF REVIEW.

Montreal, June 30, 1865.

PRESENT—Badgley, Berthelot and Monk, J.

BADGLEY, J.

HART *v.* ALIE, and HART, *tiers saisi.*— A motion had been made by the defendants to discharge the *délibéré* in this case, because it was not indicated in the motion that the party appealing had been aggrieved by the judgment of the original Court. But it was not necessary for the party to tell the Court that he was aggrieved. The fact that he considered himself aggrieved was sufficiently shewn by his asking for revision of the judgment.—Motion rejected with costs.

JOHNSTON *et al. v.* KELLY.

HELD—That a final judgment rendered by a judge, dismissing a writ of attachment under the Insolvent Act of 1864, Sec. 3, Sub. Sec. 6, is subject to review, under 27 & 28 Vic. C. 39, S. 30.

This was a motion to discharge an inscription for review of a judgment dismissing a writ of attachment under the Insolvent Act, on the ground that there was no appeal.

Motion rejected with costs.

CORPORATION SEMINARY OF NICOLET *v.* PARENTEAU *et al.* and ROY, creditor, and TOURGEON *et al.* contestants. This was a case from Sorel. Judgment was rendered upon a distribution of moneys under an execution, and in making up the judgment, the prothonotary had taken the Registrar's certificate, by which he found that Roy had the first mortgage. Judgment below confirmed.

CAIRNS *v.* HALL.—Action in ejectment. Plea that there was tacit reconduction. No proof of plea. Judgment below confirmed.

DUPUIS *v.* BELL.—Plaintiff got a judgment against defendant's daughter, and in the seizure which followed, some misunderstanding occurred in consequence of the guardian being English and not able to speak French, and the bailiff being French and unable to speak English. The bailiff made the guardian responsible for the entire debt, interest and costs. Upon that security bond judgment was rendered in the district of Iberville, condemning defendant. This judgment was clearly contrary to law and must be reversed. Security bond set aside.

VIAU *v.* JUBENVILLE.—In this case there was a difficulty about a balance. A stone building was to be put upon the place where there had been a wooden one. The question came up, was the builder bound to account for the stone on the premises? The usage appeared to be that where the builder is not paid for taking down the old building, he has a right to the stone; but where he is paid, he must account. In this case he was paid $35 for the taking down the old building. Therefore, this item must be deducted.—Judgment reformed.

ATTY.-GENERAL, and GRAND TRUNK Co.—As stated at the time of the argument, the Court did not think it would be right to dismiss the action on the demurrer, and therefore the judgment must be confirmed.

CIRCUIT COURT.

MONK, J.

SCULLION *v.* PERRY *et al.*— The plaintiff, a money lender, lent a sum of money to E. B. Perry, for which he took his note. Not being satisfied with the name of Perry, he obtained an endorser. The note, payable two months after date, not being paid at maturity, was protested, and the present action brought against the maker and endorser. The former made default. The endorser, Alport, appeared and said: I never endorsed a note made by E. B. Perry. I endorsed a note of which J. B. Perry was the maker. The name in the protest was E. B. Perry. The peculiarity of the case was that on looking at the name of the maker on

the note, it was impossible to say whether it was E. B. or J. B. He was sued as E. B. Perry and had allowed the case to go by default. The Court might assume, therefore, that his name was E. B. Perry, and assuming this, the protest would be all right. The judgment would, therefore, condemn the endorser, because he had not put in an affidavit under the statute.

DOUTRE *v.* DEMPSEY.—A petition was prepared by a number of bailiffs, and the defendant among others was asked to sign it, and paid 25 cents towards expenses. The plaintiff was employed to present the petition, and now a large bill was rendered, and an attempt made to fasten the responsibility for the whole upon the defendant. This was carrying the matter too far. The defendant had no more to do with it than any of the others, and the action must be dismissed.

BADGLEY, J.

ROCHON *v.* GASPEL.—The defendant was the tenant and occupant of a hotel near the market. Mad. Rochon, who was a widow, took a house in the neighbourhood to be used as an eating-house. This interfered with defendant's profits, and he thought he would put a stop to it by driving her away. So he called her all sorts of names, said she had no right to keep an eating-house there, and insulted and annoyed her in every possible way. Among other things, he used to call out to people going into her house, that she was a bad woman. Now this was not to be allowed under any circumstances, but more particularly when there was nothing to shew that there was any truth in the charges. $50 damages would be awarded, with costs as of lowest class appealable Circuit Court.

O'CONNELL *v.* FRIGON.—This case all turned upon the fact of a reference to arbitrators. There was a general consent that the arbitrators should settle the case between them. The two appointed at first named a third, and they proceeded to hear the parties, &c. In the course of their proceedings the City Inspector, Mr. McQuisten, was called before them as a witness, and it was upon his testimony that the case turned. Notes of Mr. McQuisten's evidence were taken, but he was not sworn at all. When the arbitrators found that there was a difference of opinion, Mr. McQuisten went with the notes of his testimony, and swore to them before a commissioner. Now this being the ruling testimony on which the arbitrators made up their mind, it would be irregular to hold their report, made under such circumstances, to be valid. The Court could only come to the conclusion that the report must be set aside. The parties might agree as to whether new arbitrators should be appointed, or the old ones chosen to do the work over again. Report set aside.

SUPERIOR COURT.

SEPT. 25, 1865.

BERTHELOT, J.,

CAMERON *v.* BREGA.

HELD—That in an affidavit for *capias*, the omission of the names of the persons from whom the deponent obtained his information is a fatal defect.

The defendant in this case moved to quash a *capias* on the following grounds: 1st That the place where the debt was contracted was not specified. The Court was not disposed to maintain this objection, as it appeared from the facts set out that the debt was contracted in Lower Canada. 2nd. It was objected that the names of the persons from whom the plaintiff derived his information that defendant was about to abscond, were not stated in the affidavit. It was merely stated that he was informed by two credible persons. This was a fatal omission, and on this ground the *capias* must be quashed with costs.

COURT OF REVIEW.

SEPT. 30, 1865.

PRESENT: Badgley, J., Berthelot, J., and Monk, J.

HUMPHRIES *v.* CORPORATION OF MONTREAL.

HELD—That the Corporation of a city is liable in damages for an accident which occurred in consequence of part of a street being encumbered with building materials to more than half its extent, and not protected by a light at night.

BADGLEY, J.—This was an application for the revision of a judgment of the Superior Court, Montreal. The action was founded upon injuries sustained by the plaintiff, a cab driver, whose vehicle was overturned in a street of the city, at a late period in the evening, when there was no negligence on his part. The circumstances were as follows: A house was being built in a certain street, and the parties building the house encumbered the street not only to half, but to even more than half, its extent with building materials. On the night of the accident the plaintiff was driving his cab, and drove up against a part of these building materials, consisting of large and cumbrous stones. The cab was upset and the horse much injured. The plaintiff's collar bone was broken, his shoulder dislocated, and he suffered much inconvenience, pain and trouble The medical man who attended him states that at the present time, months after the accident, his arm is still weak, and that it is almost impossible for him to use his fingers. The question now arises, was the Corporation guilty of negligence? The evidence shewed that the street was greatly encumbered with stone and building materials. More than that, a little further down and within a few paces of the spot, a large quantity of firewood was lying, so that the carter was obliged to make a turn before reaching the place of the accident. There were no lights in the street that night, and, what was worse, there were no lights at this dangerous spot to protect passengers who might be obliged to go along that way. Not only this, but the street inspector was sick, and the person employed in his place had gone up and down the street for weeks previous, without having done anything to guard against such accident. Under these circumstances the Court must confirm the judgment of the Superior Court which awarded the plaintiff £100 damages.—*Judgment confirmed.*

BANK OF B. N A. *v.* BENOIT.—BADGLEY, J. —A motion was made in this case by plaintiff to reject the motion of defendant for inscription, as being too late. On looking into the record the Court found that this was the case. ***Motion granted with costs.***

COWAN *v.* MCCREADY.—BADGLEY, J.,—This was a case from the Circuit Court, Montreal. The defendant, who was building a house, gave it out to be built by contract to two individuals, from the foundation to the roof. The roof was to be covered with a particular material, and this roofing was done by plaintiff. Finding, probably, that he could not get his money from the contractor, he turned round upon the proprietor, defendant in this action, and alleged that the roof was covered at his request. There was no doubt that the roof was covered by the plaintiff, but the testimony of Mr. Brown, the architect, was conclusive to the fact that Mr. McCready never had anything to do with the plaintiff, and would have nothing to do with him about the matter. The engagement was between the plaintiff and Sheehan, the contractor. The judgment of the Superior Court dismissing the plaintiff's action must be confirmed. *Judgment confirmed.*

FABRIQUE OF MONTREAL *v.* BRAULT.

HELD—That the heirs-at-law are liable each for his share only of the pew rent due by, and the charges for interring their parents.

BADGLEY, J.—This was an action brought against a single individual, Joseph A. Brault, for the recovery of the full amount of pew rent, for the pew occupied by his late father in the Parish Church, and also for the full amount of the Church charges for the burial of his parents inside the church. The question did not turn upon the largeness of the amount, but upon the defendant's liability for the whole. If the defendant could be sued at all, he could only be sued as the heir-at-law of the person who owed the rent. Now there were three brothers, heirs-at-law; therefore each was liable for a third only. Then as to the interment charges. The defendant did not make any arrangement with the Church authorities for the interment of his father and mother: he was not present at his father's interment, but assisted at that of his mother, and knew where it would take place, without making any objection. The arrangement made was with the brother of defendant. There was a privilege in favor of the Church charges, but this privilege could only go to the extent for which the individual was liable; and, therefore, defendant could only be held liable for one-third. The Church had not established the existence of any contract with defendant: they sued him as representative of the estate. Under these circumstances, the judgment would be reformed; and the judgment would only go for one-third of the amount claimed, or £36 in all. Judgment reformed.

MCGINNIS *v.* CARTIER and CARTIER opposant.

HELD—That where an opposition to the sale of land is based upon title under a deed of donation manifestly fraudulent, the judgment dismissing such opposition should be *motive* that the deed of donation was fraudulent, and not that the opposition was unsupported by sufficient proof.

BADGLEY, J.—This was an application for revision of a judgment from the District of Iberville. The plaintiff obtained a judgment on the 4th April, 1863, against the defendant on certain mortgage deeds which had reference to some property at St. Athanase, belonging to the defendant, running back to 1830, which were established by the judgment, but the amount not being fixed by the judgment. Although the right of the plaintiff was then settled, the precise amount was afterwards established with the assistance of an *expertise*. It was for this amount so found to be due by defendant to plaintiff, that the latter caused to issue the writ of execution by which the lot of land, the property of the defendant at the date of the judgment, was seized by the Sheriff. On the 7th April, 1863, only three days after the rendering of the judgment, the defendant made an act of donation, by which he transferred the land seized in this case to his two sons, one of whom was a minor and the other of age. The consideration of the donation was to be the support of the father and mother and their two daughters, besides the payment of the mortgage indebtedness of the lot of land. The children donees never disturbed the father in his possession. To the plaintiff's seizure of the lot of land, the opposants fyled an opposition, setting out title under the deed of donation, which was dismissed. The only difficulty about the case was the ground of the judgment at Iberville. The ground assigned was, that because the opposants had not made sufficient proof of their opposition, it must be dismissed. Now this was not the question: the question was the fraudulent deed of donation. The judgment of the Court of Review was in its result the same and confirmatory of the judgment rendered at Iberville, but it was upon the ground that the deed was fraudulent. As the parties had been led astray by the *motivé* of the judgment appealed from, no costs would be allowed.—***Motivé of judgment corrected.***

WALTON *v.* DODDS.

HELD—That where land sold is found to be less than the alleged extent, the consideration money will be proportionably reduced. 2. That where no application is made by the parties of payments, the Court will apply them to the most onerous debt.

BADGLEY, J.—This was an appeal from the district of St. Francis. The action was brought by plaintiff against the defendant to recover a piece of property. The plaintiff agreed to sell to defendant a piece of land measuring so many superficial acres, for which he was to receive a certain sum of money. The testimony was complete to shew that instead of 400 acres, there were only 335. There was another point. The defendant pleaded compensation by services rendered, goods and monies paid, fyling a very long and heavy bill of particulars in support of his pretension. The only question was with reference to three sums of money covered by the plea of compensation. The plaintiff was brought up and questioned respecting these payments, which were admitted

to have been made to him. It appeared that the parties had made no application of the payments, therefore it was the duty of the Court to make the application to the most onerous debt. This was the mortgage for the unpaid purchase] money. The judgment of the Court would, therefore, be reformed; $80 to be deducted from the amount of the judgment, which had properly reduced the consideration money by a proportionate reduction of the price for the short extent of the land sold.

SMITH *v.* NOAD.

HELD—That in an action of ejectment, where no rent is due, the costs will be taxed according to the amount of the annual rent.

BADGLEY, J.—This was an appeal from the district of Richelieu. The plaintiff entered into a notarial lease with defendant at the rate of £34 a year. At the expiration of the year, the defendant continued in possession of the premises. An action in ejectment having been brought against him, he pleaded that in January or February last, a bargain was entered into between him and plaintiff, by which he was to continue in the house at a rent of £40. It appeared that though there had been some conversation on the subject there had been no bargain. Admitting then that defendant had held over wrongfully, there arose a question of costs: The judgment condemned the defendant to pay the costs of suit, and the costs had been taxed according to the amount of the annual rent. The defendant contended that he should only have been condemned to pay costs of an action of the lowest class Circuit Court, because the Act in amendment of the Lessor and Lessees' Act says the costs are to be taxed according to the amount of the judgment, and if the defendant had owed a month's rent in the present case, he would only have had to pay costs as of the lowest class, Circuit Court.

The Court considered that the judgment was correct, the costs being according to the amount of the rent.—Judgment confirmed, with costs as in an action for £34.

JOHNSON *et al*, *v.* LORD AYLMER.

HELD—That the executors only, and not the usufructuary under the will, can take proceedings to support the rights of the estate. 2. Where a property, supposed to contain minerals, was sold with a stipulation that the purchaser was to cause it to be explored, but without any time for such exploration being fixed; held that the purchaser may await the result of the exploration of an adjoining lot, it being proved by scientific testimony that the working of the latter would indicate what success was to be anticipated in the lot sold.

BADGLEY, J.—This was an appeal under the following circumstances:—Geo. Johnson was the owner of a lot of land at Ascot, and becoming very much excited about the reports of mineral deposits, he endeavoured to make a very large fortune at once without any difficulty. The owner of the adjoining property was a company established in England, and carrying on mining operations to a considerable extent upon it, with Lord Aylmer as their agent. Mr. Johnson, supposing that his land contained mineral deposits, sold it to Lord Aylmer for a period of 99 years. The Court called this a sale, though termed by the parties a lease. This deed made over to Lord Aylmer all the profits to be derived from the mines and minerals, whether silver, gold or copper, that might be found on this land; and the sole consideration was that Mr. Johnson should receive out of the net profits a royalty of one-tenth. There was a stipulation in the deed that the purchaser should proceed to the examination of the ground to ascertain whether there were any mines or not; but there was no time fixed within which this was to be done. The defendant caused a series of explorations to be made, extending over some months, but in October, Mr. Johnson finding that he had not made the great fortune he expected, determined in his own mind that the bargain was not binding at all, and asserting that the mine had been abandoned, he entered into a contract with a notary at Sherbrooke, with whom he bargained for the transfer of all his rights, not only in the lot of land itself, but also in the mines and minerals, the right over which he had conveyed to the defendant. This notary undertook to institute an immediate action against the defendant to rescind the agreement made between Johnson and the defendant. He was to pay $2,000 at once to Johnson, and the balance of the $4,000 at a subsequent period. This consideration money was the consideration for the whole. Shortly after, within a week or two, Mr. Johnson died. By his will he gave his widow the usufruct and enjoyment of all his estate, and he gave to his son the whole of the property that he died possessed of. The present action was now brought by the widow and the universal legatee in their respective testamentary qualities. But they were not the representatives of the estate. The usufructuary had no right to bring an action of this description to set aside a lease or sale. Executors were appointed under the will, to whom administration was intrusted by the testator beyond the year and day, and until the final accomplishment of the will. The executors ought to be parties to this action in some way or other. The estate was in their hands, and not in the hands of the usurfuctuary. As the representatives of the estate till the final fulfilment of the will, it was for the executors to take such proceedings as might be necessary to support the rights of the estate against the defendant. But beyond all this, as already stated, there was no limitation in the lease of the time within which the mines were to be worked. Proceedings had been adopted to explore the adjoining property, and it had been proved by scientific men that the work on the adjoining lot would shew whether there were mineral deposits on the defendant's lot or not; and that it would be useless to lay out money upon the latter till it was seen how the other lot was worked, there being only two veins that need be looked for, and which appeared to run from the one to the other lot of land, diagonally across both. This testimony of scientific men was met on the other side by that of self-constituted miners, one of whom had been a shoemaker, another a small bookseller at Sherbrooke, and so on. Under these circumstances

the plaintiff's action was purely speculative, and the judgment of the Court of original jurisdiction could not be maintained. *Judgment reversed.*

FULLER *v.* GRAND TRUNK COMPANY.

HELD—That a servant has no action of damages against his employer for any injury he may sustain through the negligence of his fellow servants.

BADGLEY, J.—This was a case from the district of St. Francis, which came up for revision under the following circumstances;—The plaintiff for a long period had been an engine driver in the employ of the Grand Trunk Company. He drove a freight train between Montreal and Portland, and went over the road constantly up to the very day of the accident. He was over the road the very day before and saw nothing to complain of; but on the following day when he got to a certain part of the road, the engine and one of the freight cars fell over the embankment, and the plaintiff was very much bruised. He now brought an action for damages. There was no evidence to show any negligence on the part of the Grand Trunk Company. There was nothing to show that they had ever been called upon to make the road good, or to take any precautions respecting it; the plaintiff himself not having made any representation respecting any defectiveness in the road, though he went over the road daily. When taken to Richmond after the accident, and asked by the Superintendent if the road was in bad order, he said he did not think it was. The case involved a principle—as to the right of action of a servant against his master. It had been said that we were to be governed wholly by the French law in this case. Now railways are of recent introduction, and had no existence at the time we derived our legislation from France. It might be assumed that the principles adopted in England where the railway system was greatly elaborated, and the principles which prevailed in the United States, where the system was also much complicated, and which principles, moreover, are much the same as those of the common law as it now exists in France, are the sure principles for our guidance at the present time. The plaintiff in this case was the servant of the Company. He undertook by the fact of his engagement in their service to guarantee himself from all the consequences of his engagement. The road belonged to the Company, but it was in evidence that there were persons of competent skill who had charge of the road, and any application to them would have been attended to. They were equally servants with the plaintiff, and if there was anything wrong, the blame must be on the servants, because they were in charge of the road. The leading case in England was Priestly *v.* Farrell reported in 3 Meeson & Welsby. The judgment went upon the principle that the plaintiff was in the performance of his duty as a servant. Lord Abinger said it was admitted there was no precedent of a servant bringing an action against his master for carelessness of a fellow servant, and, therefore, the Court was at liberty to look to the consequences of establishing such liability. Instances were given, such as that the owner of a carriage would be responsible to his coachman for the harness-maker, &c., which showed the absurdity of such argument. The next case was Hutchinson *v.* York and Newcastle and Berwick R R., 5 Exchequer Reports, where several servants being employed by the same master, an injury to one occurred through the negligence of the others, and the same principle was followed. See also Barwell *v.* Corporation of Boston, 4 Metcalf's Rep., and Waller *v.* South Eastern R.R., vol. 9, New Series of the Jurist. Following the doctrine established in these cases, the judgment dismissing the plaintiff's action must be confirmed.

TESSIER *v.* BIENJONETTI.

HELD—That a deed of donation of real estate will not be considered fraudulent because the donor had a chirographary creditor, who obtained judgment against him eighteen months after the donation, which was made for good consideration; and the seizure and sale of the land donated in the donee's possession at the instance of the chirographary creditor will be set aside.

BADGLEY, J.—The circumstances of this case were as follows:—On the 29th January, 1861, one Legault made an *acte* of donation before notaries by which he conveyed to the plaintiff certain real estate in Soulanges, for the consideration mentioned in the deed. Tessier at once entered into possession of this land under the deed of donation. While the land was in his possession Bienjonetti, a chirographary creditor of Legault, obtained judgment against the latter in 1862, more than eighteen months after the date of the deed of donation, and during the time the plaintiff was the proprietor and holder of the land. Being only a chirographary debt, there could have been no real hypothecary claim upon the property by virtue of it. In due time execution was issued against the lands and tenements of Legault by Bienjonetti, and this lot of land was seized in the plaintiff's possession, as being the property of Legault. Now it was generally known, and known by the defendant also, that this land did not belong to Legault, but that the plaintiff was its reputed proprietor, and in actual possession of it as such. There could be no doubt that Bienjonetti was aware that the actual possession of the property was in the plaintiff, by virtue of the deed of donation. It would appear that by some mistake or other the plaintiff was too late to make his opposition to the sale, and he attended at the *décret*. The object of his attendance must have been to secure the property from being sold for less than he had paid for it. It was adjudged for £93 to Bienjonetti. Steps were taken by Tessier to prevent any title from being given. No money had been paid by Bienjonetti except the costs of the proceedings. The Court saw no difficulty in the case. The property did not belong to the defendant, and Bienjonetti was not even a mortgagee. At the time the property was sold he had no right or claim whatever against the land itself, or against its then owner. It had been said that the sale or donation was fraudulent, but this was not true, for Bienjonetti was only a chirographary creditor, and the property was only worth about £100, which was more than cov-

ered by Tessier's mortgage upon the land, and by pre-existing mortgages. There was nothing on the face of the record to show that there was any fraud in the matter. The judgment would be confirmed.

SUPERIOR COURT.

MONTREAL, 30th Sept., 1865.

MONK, J.,

WISHAW *v.* GILMOUR *et al.*—This was an action for a balance of account. The defendant had produced an account between Mr. Wishaw and Gilmour & Co., by which account it appeared that considerable sums of money had been paid from time to time by Mr. Gilmour to the plaintiff. These payments were no doubt made during the existence of the old firm. A balance remained of £525, which plaintiff contended that he was entitled to receive. Defendants alleged that across the face of the account there was an entry, "*settled in full, A. Heward.*" Plaintiff declared that there was no date to this, but Mr. Heward had been brought up and swore positively to the time. The plaintiff's action must therefore be dismissed with costs.

WATTS *et vir* *v.* PINSONNEAULT.—This was an action against the defendant for injury done to the property of plaintiffs by defendant's tenants throwing out all kinds of filth on their property. The contradiction of testimony was such that it was utterly impossible to determine whether the dirty water was thrown from the Cosmopolitan Hotel or from the defendant's place. The defendant, however, had stepped in and relieved the Court from all anxiety on this head by acknowledging his responsibility. He had bricked up his windows, and thus rendered the repetition of the offence utterly impossible. He had done more; he had acknowledged his responsibility for the ceiling, and the injury inside the house. He had even gone further. When this action was taken out, the tenant made the repairs, and the defendant had acknowledged the justice of the account and had paid it. The whole case was thus covered. The defendant having obtained leave to plead after default entered against him, and paid all costs up to that time, the action should have been stopped at once. Instead of that the plaintiffs had gone on. The action must, therefore, be dismissed with costs.

CANTIN *v.* VIGNEAU.—The plaintiff had taken out a *saisie-arrêt* against the captain of a boat. It was not the captain of the boat at all, it was the owner. The whole proceeding was full of irregularities, and the *exception à la forme* must be maintained, and the *saisie-arrêt* set aside.

FOULDS *et al.* *v.* MCGUIRE.—The defendant becoming embarrassed, the plaintiff, one of his creditors, urged him to make a settlement, and they agreed that 50 cents on the dollar was to be the amount of the composition. The plaintiff showed himself very active, sent for the creditors; got them into his office; the defendant was directed to withdraw, and the result of the interview was that the creditors agreed to accept the composition. Now the plaintiff brought his action for the whole amount, saying that he never intended to take 50 cents, because he had other security which he had no intention of abandoning. The Court saw nothing in the evidence to sustain plaintiff's pretensions, and the action must be dismissed.

DEDNAM *v.* WOOD.—An action *en séparation de corps*. The facts were not of a character to admit of much discussion. The prayer of the declaration must be granted.

RAPHAEL *v.* MCDONALD.

HELD—That it is not necessary to allow the ordinary delays with respect to service of declaration at the prothonotary's office, under C. S. L. C., C. 83, Sec. 57.

This was a case in which a *capias* issued, directed to the Sheriff, and to him alone. The Sheriff was directed to take the body of the defendant, and he did so. The defendant was arrested on the 30th April under this *capias*, and on the 7th June, in vacation, service of the declaration was made at the prothonotary's office by a bailiff who returned the certificate of service to the Sheriff, and the Sheriff returned the whole of the proceedings to this Court. Upon this the defendant fyled an *exception à la forme* in which he says, in the first place, that there was no legal service of the declaration at the prothonotary's office, and not only was the proceeding defective in that particular, but the writ was returned into Court three or four days after the declaration was left at the prothonotary's office. As to the first point, the service by a bailiff was a perfectly good service. On the second point, it was contended by the defendant that ten days must elapse between the time the declaration is left at the prothonotary's office and the return of the writ. Now the law specified no delay between the leaving of the declaration and the return of the writ. It merely said, "service of the declaration may be made on the defendant either personally or by being left at the office of the prothonotary or clerk of the Court, at any time within three days next after the service of such writ, if the same have issued in term, or within eight days next after such service if the writ has issued in vacation." C. S. L. C., P. 721. The *exception à la forme* must be dismissed.

CIRCUIT COURT.

MONTREAL, 30th Sept., 1865.

BADGLEY, J.

BRAHADI *v.* BERGERON *et al.*

HELD—That the usual delays for ordinary services must be allowed between service of copy of declaration at the prothonotary's office, and return of the writ in cases of attachment under C. S. L. C., Cap. 83, Sec. 57.

In this case an attachment was issued, and on the 4th May three copies were deposited at the prothonotary's office for the three defendants. Now the writ was returned on the 8th May, so that there were only four days between the service and the return. This service was by virtue of the statute which allows service of the declaration to be made at the office of the prothonotary within three days after ser-

vice of writ in term, and eight days in vacation. The defendants objected to the service on the ground that they were entitled to the five days' delay between service and return prescribed by another clause of the statute. Plaintiff urged that the leaving of a copy at the prothonotary's office might be done at any time before the return of the action, within the three and eight days respectively. The Court was of opinion that there was no difficulty about the case. The language of the law termed this leaving of the copy of the declaration a service, and being a service there must be the same delay allowed as prescribed by the 107th clause for services in general. The time of service must, therefore, be held to be short, and the *exception à la forme* maintained. (See Godfrey *v.* Kitchener, and Ward *v.* Cousine cited as precedents. But see also a ruling by Mr. Justice Monk, in Raphael *v.* McDonald, same day, holding that the usual delays are not necessary with respect to service of declaration.)

RODIER *v.* TAIT.

HELD—That a right of *mitoyennete* connot be established by mere verbal evidence, when there is no title and the marks on the will do not indicate any such right.

This was an action for the value of a *mur mitoyen*. The plaintiff had acquired certain property on St. Paul Street, the back of which abutted on the property of the defendant, by a high stone wall made to separate the properties. The defendant had built against this wall and made holes in it. The plaintiff said, this is not a *mitoyen* wall; if you want it to be a *mitoyen* wall, I am ready to consent on the price being paid me. Now it was true that division walls were by presumption *mitoyen*. The right of *mitoyenneté*, however, could only be established by title, or by such marks upon the wall itself as would show its *mitoyenneté*. Now there was no title produced, and the pretensions of the defendant rested upon verbal testimony alone, whilst it was proved that the wall was built in such a way that the coping turned down into plaintiff's lot. There being no title or marks the plaintiff's action must be maintained.

CROWN CASES.

COURT OF QUEEN'S BENCH—CROWN SIDE.

MONTREAL, 25th Sept., 1865.

QUEEN *v.* DAOUST.

NEW TRIAL FOR FELONY.

RAMSAY, for the Crown, moved that the Court do proceed with this case, which had been held over from the preceding term, under the following circumstances:—Two Indictments for forgery had been found against Mr. Daoust, and a conviction obtained on the first. At the trial on the second indictment, new and important evidence was adduced which satisfied the jury that the prisoner had been authorized to sign the name of the prosecutor, and he was acquitted. An application was then made for a new trial on the first indictment, that the new evidence might be presented. Mr. Justice Mondelet granted this motion, being of opinion that the prisoner should have an opportunity of proving his innocence, and he was held in the sum of $1,000 to appear for trial next term.

AYLWIN, J., said that the Court would not proceed to hear this case. The order given by the Court last term was so novel and extraordinary, that he could not take on himself the responsibility of proceeding. He would, therefore, reserve the point for the opinion of the five judges of the Court of Queen's Bench, and in the meantime the prisoner was admitted to bail in £500 for his appearance at the next term of the Court of Queen's Bench, in appeal, and on the first day of next term of Queen's Bench, Crown side.

QUEEN *v.* FOREMAN.

Oct. 4, 1865.

HELD—That a defect such as the omission of the word 'Company' in an indictment for embezzling funds belonging to the Grand Trunk Railway *Company* of Canada, comes under the class of formal defects which are cured by verdict.

Judge Aylwin being about to pronounce sentence upon the prisoner Foreman, convicted on an indictment for embezzling monies belonging to the "Grand Trunk Railway of Canada,"

CLARKE, for the prisoner, moved for arrest of judgment on the ground that there was no such body incorporated as the Grand Trunk Railway of Canada, and contended that the prisoner could not be sentenced for embezzling money belonging to a Corporation which had no existence.

RAMSAY, for the Crown, said the omission of the word 'Company,' even if fatal, was a formal defect, which was cured by verdict. Besides the prisoner had really suffered no wrong, for if the omission had been objected to earlier, the Court could have ordered the error to be corrected.

AYLWIN, J., said the objection had been made too late. If it had been raised before, the Court would have taken notice of it; but the prisoner had been convicted of having embezzled monies the property of the Grand Trunk Railway of Canada.

Sentence was then pronounced, condemning the prisoner to three years' imprisonment in the Provincial Penitentiary.

(See Consol. Stat. Can. Cap. 99, Sec. 84, as to formal defects which are cured after verdict.)

OCT. 4, 1865.

QUEEN *v.* HOGAN *et al.*

HELD—That on the trial of a misdemeanour, the Crown has the same right to order a juror to stand aside, without showing cause until the panel is exhausted, as in a felony.

RAMSAY for the Crown having ordered a juror to stand aside;

DEVLIN for the prisoners objected, saying that as in a misdemeanour the defence had no peremptory challenge the Crown could not exercise any.

RAMSAY said the Crown never had any peremptory challenge. It could only challenge for cause, with this privilege, that it was not compelled to show its cause, until it appeared that without such jurors the trial could not

proceed. There was not, therefore, any distinction to be drawn between felonies and misdemeanours.

MONDELET, J. overruled the objection.

Oct. 7, 1865.

JOSEPH MESSIER, for *Habeas Corpus*.

HELD—That when a commitment is illegal on its face, the Court will not wait till the committing magistrate has been notified to produce the papers, but will order a writ of *habeas corpus* to issue *instanter*.

Messier, the petitioner, had been committed by a magistrate of St. Hilaire, for threats.

CHAPLEAU, for the prisoner, applied for a writ of *habeas corpus*, on the ground that the warrant of commitment was manifestly illegal, it being nowhere therein stated that the depositions had been taken on oath.

RAMSAY, for the Crown, said the papers were not before the Court. The committing magistrate should have been notified to produce them. This notice was rendered necessary by the terms of the Statute, (C.S.C. Cap. 102, Sec. 63.)

MONDELET, J., after taking communication of the copy of the warrant of commitment, ordered the writ to issue *instanter*.

OBITUARY NOTICES.

HON. MR. JUSTICE MORIN.

The death of Augustin Norbert Morin, a judge of the Court of Queen's Bench and one of the Commissioners for the codification of the laws, occurred at St. Adele, county of Terrebonne, on the 27th July last, in the 63rd year of his age.

Born at St. Michel, in 1803, Mr. Morin was educated at the Quebec Seminary. He studied law under the late Hon. D. B. Viger, and was admitted to the bar of Montreal in 1828. In 1830 he entered Parliament, and from the first his abilities excited the attention of the leaders of the different parties. In 1834 he was deputed by his party to carry to Great Britain their petitions as to the state of the Province, to have them presented through Mr. Viger, and to support that gentleman in the representations he was to lay before the British Government of the condition and grievances of which the Colonists complained. This task he appears to have fulfilled satisfactorily, and in such a manner as to earn the thanks of those who had entrusted him with the charge. In 1842, after the Union of the Provinces, he filled the office of Commissioner of Crown Lands in the Lafontaine-Baldwin administration, for more than a year. At the election of 1844, he had gained so thoroughly the confidence of his countrymen that he was elected by two constituencies—Saguenay and Bellechasse—the latter being the one which he selected. In 1848 he was again returned for the same County, and on the assembling of Parliament was elected Speaker, an office which he held till 1851, when he formed an administration in conjunction with Mr. Hincks, taking the post of Provincial Secretary, and representing the County of Terrebonne. In 1853 he resumed his former office of Commissioner of Crown Lands, which he held till his appointment in 1855 as a Judge of the Superior Court of Lower Canada. In 1859 he was appointed one of those to whom the task of codifying the Civil Law was entrusted. In the "Life of Metcalfe," Kay thus describes Mr. Morin, and though not in all points correct, the description shews the light in which he was viewed by strangers:—

"Mr. Morin is a French Canadian, commissioner of Crown lands. He had been thrown in early life, by the troubles of his country, into the stormy sea of politics; but I believe had followed the law as a profession. His character, as described to Metcalfe, would have fitted well the hero of a romance. With administrative abilities of the highest class, vast powers of application, and an extreme love of order, he united a rare conscientiousness and a noble self-devotion, which in old times would have carried him cheerfully to the stake. His patriotism was of the purest water. He was utterly without selfishness and guile. And he was of so sensitive a nature, and so confiding a disposition, that it was said of him, he was as tender-hearted as a woman, and as simple as a child. But for these—the infirmities only of noble minds—he might have been a great statesman.

J. B. C. DE LORIMIER.

Nous regrettons d'avoir à enrégistrer la mort de Jean Baptiste Chamilly de Lorimier, Ecr., avocat, arrivée sous de bien penibles circonstances.

Ce respectable citoyen était parti de chez lui, rue St. Vincent, mercredi soir, vers 8½ heures, pour aller faire une courte promenade de 10 minutes, comme il en avait l'habitude. Il ne revint pas à la maison, et sa famille inquiéte commenca à faire des perquisitions; la police se mit également aux recherches, car on avait lieu de soupçonner qu'il avait été victime d'un meurtre. Enfin dimanche matin, il fut trouvé dans le canal Lachine, près du pont Wellington. A une enquête, qui eut lieu lundi matin, le jury a rendu un verdict de "noyé accidentellement."

M. de Lorimier était frère de Chevalier de Lorimier, le martyr politique de 37-38, et avait pris lui-même une part active dans ces evènements. Il comptait un grand nombre d'amis, et certes, le concours empressé de plusieurs de nos premiers citoyens qui assistaient hier à ses funérailles témoignait hautement du degré d'estime dont il jouissait parmi ses compatriotes.—*L'Ordre, 26th July*, 1865.

CYRILLE BOUCHER.

This gentleman died very suddenly on the morning of the 9th of October last. He was a member of the Montreal bar, but was chiefly known as a *literateur*, having been a contributor to *L'Ordre* of Montreal, and at the time of his death he wrote for *L'Echo du Cabinet de Lecture Paroissiale*, and other papers.

CYRILLE ARCHAMBAULT.

It is with deep regret that we record the death of Mr. C. Archambault, who was one of those who lost their lives by the boiler explosion on the steamer St. John, near New York, on the 29th October. Mr. Archambault had attained a high standing at the bar. Cut off by a painful death in the full vigour of manhood, his untimely end excited the profound sympathy and regret of the whole community.

APPOINTMENTS, CHANGES, &c.—On the 12th August last the following appointments were gazetted:—

"J. T. Taschereau, Esq., Q. C., to be a Puisné Judge of the Superior Court for Lower Canada, to take precedence next after the Hon. F. G. Johnson. J. U. Beaudry, Esq. Advocate, to be a Commissioner for Codifying the Laws of Lower Canada in Civil matters, in the room of the Hon. A. N. Morin, deceased. The Hon. L. S. Morin, Advocate, to be a Secretary to the Commission for codifying the Laws of Lower Canada in Civil matters, in the room of J. U. Beaudry, Esq., appointed a Commissioner for that purpose.

COMMISSIONS TO THE BAR, DISTRICT OF MONTREAL, FROM 1st JULY, 1865.

3rd July, 1865.

James M. G. Roney, J. Bte. Sicotte, Benoni, A Longpré, Alexis A. Laferriére, Pierre S. Lippé.

7th August, 1865.

Arthur McMahon.

4th September, 1865.

André B. Chas. Ouimet, Achille David, Arthur Dansereau, Chs. Chamilly de Lorimier, Richard S. Lawlor, Chs. L. Champagne.

2nd October, 1865.

Arthur E. Valois, Jos. O. Turgeon, Andrew Leamy, Louis N. Demers.

MISCELLANY.

LUCUS A NON LUCENDO.—Mr. Roebuck, M. P., appears, like some elsewhere, to have gotten the dignity of Q. C., "learned in the law," though his counsel fees have been infinitessimally small, and his briefs in numbers, or rather number, easy to count. He recently sought to be again returned for Sheffield, and Mr. Foster, a lawyer, spoke against him (Mr. R. present) to the electors. Among other things, according to the *Times* report, Mr. Foster said:

"Mr. Roebuck went the Northern Circuit. He wears a silk gown. (The Chairman.—Who gave it to him?) Now, in the great Northern Circuit I have found in many towns clients who have trusted me; but during the whole course of my experience never but on one occasion did I see Mr. Roebuck in any case whatever. (Laughter.) He got his silk gown, but was that reward given to him because of his merits on the circuit? No: it was given to him because you gave to him that position without which he was nothing, and *with which he got his silk gown*. (Cheers.)

DRUMMOND COUNTY.—A correspondent writing to the *Montreal Gazette*, from Drummondville, under date 8th Aug., 1865, complains of the non-attendance of a Judge to hold the Circuit Court in the county of Drummond. Since the establishment of the Court, only thirteen terms had been held out of twenty-one, and even when the Judge happened to be present, the business of the Court was not ready to be proceeded with on account of the uncertainty that always attended his presence. Three separate times, a whole year had elapsed without a term being held.

THE DEATH PENALTY.—The Zurich Commission, which was appointed for the purpose of drawing up a new penal Code, has decided by nine votes to two against the retention of capital punishment.

BANK OF MONTREAL *v.* REYNOLDS and SPROWL.—This was an action by the Bank against Mr. Reynolds, Sheriff of Ontario County, the maker, and Sprowl, the endorser, for $800, amount of a promissory note, which the Bank had discounted for Reynolds. The defendant pleaded usury; that the note was made payable at Toronto, although discounted at Whitby, to enable the Bank to receive ½ per cent in addition to the 7 per cent allowed by law, the ½ per cent being the percentage allowed by law on a 90 days' note payable at any other bank than the one discounting the note. The verdict of the jury was in favor of the Bank. But in another case between the parties, tried the same day with a different jury, the verdict was for the defendants.

The Lower Canada Law Journal.

VOL. I. JANUARY, 1866. No. 3.

THE GRAND TRUNK RAILWAY CARTAGE QUESTION.

We have received a copy of the judgment rendered by Mr. Assistant Justice Monk on the 9th December last, refusing the application made to him at the instance of the Attorney General, against the Grand Trunk Railway Company of Canada, for an injunction to restrain that Company from the exercise of the business of common carters within the limits of the city of Montreal. We have not space for more than a brief summary of the judgment which reviewed the pleadings, evidence and authorities at considerable length.

The Grand Trunk Company employ exclusively a Mr. Shedden to collect and deliver freight within and near the city of Montreal. The master carters of the city are excluded from all participation in the business of collecting and delivering for the Grand Trunk; and consequently it was sought to restrain the Company from the exercise of this privilege or monopoly, carried on this way through the instrumentality of Mr. Shedden. The petition set forth several distinct charges against the Company, viz.: that they transported goods for hire from their depots to and from the stores and residences of the citizens; that they charged tolls for the transport of goods and merchandize from Montreal to places on their line of railway; and that such tolls were uniform and the same whether the goods were carted at the expense of the sender and receiver, by his own carter, or at the expense of the Company; with various other allegations. The conclusions of the petition asked for seven different orders or judgments, viz.: that it should be adjudged and declared:—

"1st. That the Company have exercised a franchise and a privilege not conferred by law.

2nd. That the Company have offended against the provisions of the Act or Acts creating, altering, renewing or re-organizing the said Corporation.

3rd. That the defendants have exceeded the powers, capacities, franchise and jurisdiction conferred upon them.

4th. That the imposition of tolls, including the cartage of the goods and merchandize in and within the limits of the city of Montreal, may be declared illegal, and in contravention of the law.

5th. That the imposition of tolls without the authority of a by-law, approved of by the Governor in Council, &c., be declared illegal.

6th. That it be declared that the defendants carry on the business and occupation of common carters within the limits of the city of Montreal, and that their doing so is illegal.

7th. That the Company be enjoined to abstain from using the occupation of carters within the city of Montreal, and be restrained [illegible] carrying goods and merchandize from and to their depots, to and from the residences and stores of the citizens of Montreal."

The defendants met the action by a motion to quash the writ and petition, by a special demurrer, and by three other pleas amounting to the general issue. The reasons assigned in the demurrer were that the allegations of the petition were vague, and the pretended offences not particularized as to time, place or circumstance; that it was not alleged that any person was injured, &c. The motion to quash was rejected on the 26th April, 1865, and proof ordered *avant faire droit* upon the demurrer. A large number of witnesses was examined on both sides. His Honour remarks upon the evidence as follows:—

"After considering this conflicting testimony with great care, I have no hesitation in expressing the opinion that it is proved that the collecting and delivering freight, merchandize, packages, &c., by the Company's carters, is a convenience and beneficial to the public. It must, I think, be obvious to every dispassionate and unbiassed mind, that, if not absolutely necessary to carry on the business of the Company, yet that their system in this particular must be highly useful to their customers; and it appears to me, moreover, that this opinion is fully corroborated by the evidence adduced by the defendants."

After noticing at considerable length the authorities and cases cited by counsel, his Honour concluded as follows:—

"I am clearly of opinion that the exclusive employment of any particular carter or

carters by the Grand Trunk is incidental, if not absolutely essential, to their business of common carriers, and that, therefore, the Company does not, in this particular instance, stand charged with an illegal act. This I hold to be true under the facts proved in this case, in so far as this exclusive employment of Mr. Shedden goes. I think, moreover, that this right rests upon principles of the common law. But, by a provision in the Railway Clauses Consolidation Act, the Company are empowered to do all things necessary or requisite for the more effectually fulfilling and carrying out the objects of their charter, and I incline strongly to the opinion that this is one of the means of attaining such a result, impliedly granted to the Company. It has been said that although this course may be essential in other localities, yet that it is not so in the city of Montreal, were hundreds of carters are ready and willing effectually to perform all the cartage in collecting and delivering for the Company. In point of fact, this may be true, but in my view of the law, it is clearly incidental to their business as common carriers, and if so, the Company must, in the administration of the important interests confided to their charge, and in their extended responsible relations to the public, be the sole judges, whether they will follow their present system or revert to the old course of business. They collect and deliver now under special contracts with their customers. In my opinion these contracts are legal, and I cannot declare them illegal. So long as the public at large are not injured, and do not complain, I cannot interfere by injunction as prayed for by the petitioners. The motives of this decision, as embodied in the final judgment of record, will concisely disclose the grounds in law and in fact, upon which my refusal to issue the injunction rests."

The motives of the judgment are as follows :

"Considering that the petitioners have not established, by legal and sufficient evidence, such a case of public interest as is required by the statute, authorizing the present proceeding ; considering moreover, that it is not proved by the evidence adduced in this cause that the complainants have suffered or have been directly aggrieved to such an extent as would justify the issuing of an injunction in the present case as prayed by their petition : seeing that it results from the evidence adduced that the fact of collecting and delivering by carters, exclusively employed to that effect by the defendants, is not injurious, but, on the contrary, advantageous to the public ; considering that the defendants have the right, as common carriers, and in the prosecution of their lawful business as such, to employ exclusively any carter or carters they may, in their discretion, select to collect from and deliver freight to their customers ; and that such exclusive employment of particular carters is not a violation of their charter, inasmuch as the act itself is essential or incidental to their business as common carriers ; considering that no injunction can by law issue in this case to restrain the defendants from illegal acts, by and from which the petitioners are not shewn to have been distinctly aggrieved, and which are not, at the same time, proved to be injurious to the public ; and considering that none of the individuals or parties using the defendants' road, and paying their charges for cartage, have complained in the present case, I, the said Judge, do refuse the said petition with costs."

Messrs. Stuart, Q. C., Roy, Q. C., and Dorion Q. C., Counsel for the Petitioners ; Mr. Ritchie, Counsel for the defendants.

LIABILITY OF MUNICIPALITIES.

A decision was rendered on the 31st Oct last, in the Circuit Court at Sherbrooke, by Mr. Justice Sicotte, in the case of Harvey *v.* Municipality of Hereford, holding that Municipal Corporations are not liable for the acts of their agents, but that these agents are alone responsible for their own acts. The following are some extracts from the judgment :—

"The plaintiff complains that the Municipality of Hereford, by their Secretary, agents and servants, caused, prior to Feb., 1861, taxes to be assessed upon lot No. 9, Township of Hereford, as land belonging to a private person, and not to the Government, and that the land was sent up from the Secretary of this local municipality to the Secretary of the County to be advertised for sale for unpaid taxes ; that the land was sold for taxes and purchased by him for $3.85, and that he took the deed after the expiration of the two years. Subsequently the same land was advertised for sale by the Crown, and to prevent the ejection of one Washburn, to whom plaintiff had sold the land, he, the plaintiff, was obliged to buy it from Government for $120. The plaintiff further alleges that by reason of the negligence and the irregularities of the Corporation of Hereford, their agents and servants, in causing this land belonging to the Government to be sold as the land of indi-

viduals, he was led into error, and, by the failure of defendant to defend plaintiff from trouble, he suffered to the amount of $74.

The defendant by a demurrer denied the right of the plaintiff to claim any damage from the Municipality of Hereford under the circumstances. Two questions are raised by the demurrer, both having an important bearing upon the working of the municipal system. It is pretended that the Municipal Councils are not responsible for the acts of the different officers they appoint, in all cases where the duties of the officers are ordained and prescribed by the Statute, and independent of the municipal bodies..... Has the Statute declared that municipalities are liable to damages for the fact that lands have been valued by the valuators as in the occupation of one party named, and have been assessed, upon this return, for municipal purposes? No; but the Statute directed the Councils to appoint valuators, and prescribed the duties of the latter in a very imperative manner, independent of any orders and instructions of the municipalities. The valuators are, for the purpose of valuation, the officers of the law, which is superior to the body directed to appoint..... Purchasers must ascertain for themselves if all the requirements of the law have been complied with, and if the land can be sold; all is at their risk. This is the condition of purchasing acres for cents.....The letter of the law as well as the general principles are decidedly against the right of action as claimed by the plaintiff. The action is therefore dismissed with costs."

Sanborn & Brooks, for plaintiff; Felton & Felton, for defendant.

THE CASE OF THE KIDNAPPERS.

A short summary of this memorable case, with an abstract of the remarks of Mr. Justice Meredith at the time final judgment was rendered by the Court of Appeals at Quebec, will be found in the present issue. Few cases that have occupied so large a share of the attention of our tribunals have created so little public excitement. It is hardly going too far to say that the decision at Quebec was received by the public with profound indifference. This lack of interest may no doubt be attributed in a great measure to the conflicting feelings excited by the case. Though any decision which had the semblance of infringing upon the liberty of the subject would instantly kindle the utmost indignation throughout the community, yet in this instance the prisoners being mere mercenary conspirators, who had themselves sought to deprive a refugee of liberty and asylum, no one felt much disposition to see the law strained in their favour, if the law said that they were not entitled to be admitted to bail. On the other hand, the crime of the prisoners was perhaps not viewed with the detestation it deserved, because the refugee himself was not regarded with any of that popular admiration and esteem which some political exiles have attracted. Thus the public mind was to some extent prepared to accept without cavil the decision of a competent Court, whichever side it favoured.

In a legal point of view, however, the case is one of absorbing interest. Able and astute lawyers on the bench and at the bar have taken opposite sides on the questions raised; and the learned counsel by whom the case was conducted, displayed great ability and research in the support of their views. The arguments and judgments, investigating as they did all the cases and authorities on the subject, will throw much light upon the law of bail in all time to come.

But, unfortunately, the value of the final judgment at Quebec as a leading case, has been greatly lessened owing to the diversity of opinion among the members of the Court on the questions submitted for decision. A majority of one in the Court of Appeals is not as satisfactory as could be desired, and might be reversed by a slight change in the members of the Court.

It is not improbable, however, that some change in the law may be made by the Legislature, which will remove the difficulty. The Statutes relating to bail, like too many other parts of our Statute law, are not without serious ambiguities; and it may be deemed advisable, either to remove some of what were anciently called enormous misdemeanours into the class of felonies, or to make exceptions of certain misdemeanours, so as to leave it discretionary with judges to bail persons charged with them.

REMARKABLE TRIALS IN LOWER CANADA.

No. 3. The Beauregard Case.

Among the criminal cases which have occupied a large share of public attention, the trial of Beauregard for the murder of Anselme Charron stands out prominently, both on account of the great number of witnesses examined, the length of the trial (extending over eight or nine days), and the mysterious circumstances surrounding the commission of the crime. The victim was a well-to-do farmer named Anselme Charron, residing at the parish of St. Charles, about two and a half leagues distant from the town of St. Hyacinthe, where the murder was committed. The only apparent motive for the murder was the desire to obtain possession of a small sum of money which Anselme Charron carried on his person. Both parties at the time were considerably under the influence of liquor, but though suspicion rested on Beauregard, who was last seen in company with the deceased, it was not till some weeks had elapsed that he was arrested.

The murder was committed on the night of the 2nd of April, 1859, and the circumstances may be briefly traced as follows :

About nine o'clock in the morning of Saturday, the 2nd April, Charron left home with his horse and cart to go to St. Hyacinthe, which, as we have already stated, was situated at a distance of two and a half leagues. A little boy, a nephew of his, stated at the trial, that on the morning of that day he saw the deceased dressing in his room apart, and before he left he went to a small box in which he kept money, and took out two rolls of paper money which he showed to the boy, as he was in the habit of doing in order to instruct him in the value of bank notes. The first knowledge we have of him at St. Hyacinthe is that he was seen drinking in Ducharme's tavern in the early part of the day. Hence he went to a tavern kept by a man named Guertin, and in this place, Beauregard, the prisoner, was seen kneeling by the side of Charron who was lying on a sofa, and engaged in close conversation with him. A man who owed Charron $25 here joined them, and the three having gone to another tavern, the debtor paid the $25 in the presence of Beauregard. They then went to Laflamme's tavern and had more drink. Among other places visited by Charron that day was the house of a man named Ewing, who paid him $45 in bank notes and quarter dollars. About half-past seven in the evening deceased was seen at Ewing's house taking tea. About eight o'clock a person with whom Charron had made an appointment for that evening at Laflamme's, saw him standing at the door of another tavern. Charron proposed to him that they should go to Guertin's tavern and have a steak and some oysters. At Guertin's, Beauregard, who appears to have followed Charron with considerable pertinacity, again joined him, and called for liquor, which Charron paid for. Later in the evening, Charron, who was by this time in a state of inebriation, was at Laflamme's, and left that place in company with Beauregard. Some policemen who met them observed the prisoner holding Charron up by the arm, and asked him where he was going? Beauregard replied, "Don't be alarmed, I will take good care of him." The policeman stationed in the street then observed the two going in the direction of the bridge known as the Biron bridge, and about fifteen minutes after Beauregard was observed coming back alone, breathing hard and walking fast. One of the policemen meeting him inquired where he had left Charron. The reply was, "Oh! he is quite well, he is getting on swimmingly, like a hat floating on the river." Beauregard then went to Laflamme's tavern and ordered a treat. Before this he did not appear to have had any money. Then he went to Pourrin's and stayed till such time as Pourrin said he must shut up his place. There was nothing to show whither he went then. His daughter stated at the trial that he had not, to her knowledge, gone home that night.

The watch found in the pocket of deceased had stopped at 13 minutes to 11. About this hour a party playing cards at Marchesseau's, on the other side of the bridge, heard cries from the bridge so loud as to attract their attention, and they opened the door and looked out. The cries did not continue long, and the party returned to their cards. On the other side of the river, another party playing cards was also disturbed by cries of murder, and they went out and inquired of their neighbours the cause of the cries. These incidents occurred about the same time, close upon eleven o'clock. A gentleman named Nagle also heard cries of murder from the bridge, and rushing out went part of the way across the bridge, and thought he saw an object moving away, but was not very sure. Another person who crossed the bridge that night, met a man on it, and it was

proved that Beauregard subsequently asked Guertin if he were not the man whom he met on the bridge, thereby admitting that he had been on the bridge the night in question.

Nine days after Charron disappeared a friend of his who lived in the same village went to St. Hyacinthe, and ascertaining that Beauregard was the last man seen in company with deceased, sent for him to a tavern, treated him and asked him what became of Charron. The reply was that he did not recollect. The other then said : " One of the policemen saw you and the deceased together ; he spoke to you and you answered him." The policeman was sent for, and repeated th statement in the presence of Beauregard ; but the latter on being again requested to state what he had done with Charron, reiterated that he forgot. This refusal to answer obviously raised a presumption of guilt.

We now come to the motive assigned for the crime. On the Tuesday preceding the disappearance of Charron, Beauregard had applied to the municipal authorities for a tavern license, and had been refused. He then said that if he had money he would get a license, and on the Monday following, he stated that he had now money enough to get one. Besides this, there were other proofs that he had come into possession of a sum of money.

The body of deceased was found about a month after the murder, at a distance of 15 or 18 arpents from the bridge. On the temples were contusions, and the injuries were stated by the medical men to be multiple, produced by repeated blows, and might have been caused by blows of a skull-cracker, such as Beauregard was proved to have carried about with him. The inference was that the murderer, after inflicting repeated blows on the head of his victim, had thrown him from the bridge into the river. On the body was found altogether only $24, shewing a large deficit in the sum which it was proved that Charron had received on the day of the murder. There was no proof that he had made any payments during the day, nor were any receipts found on his person.

There was some additional testimony of a direct nature given by one Lusignan, a man of ill reputation and a drunkard, who had been made a confidant by the murderer, Very slight importance was attached to this evidence by the Court, and therefore we need not dwell upon it. He stated, however, that Beauregard confessed to him that he had burned certain notes on foreign banks which he had taken from the person of his victim, and it appeared from other evidence that Charron had received such notes during the day.

The trial which took place at Montreal, in October, 1859, before Hon. Mr. Justice Aylwin, extended over a week, and caused considerable excitement. The jury found the prisoner guilty, and he was subsequently executed before the Montreal Jail.

RIGHTS OF DISSENTIENTS.

An important decision has been rendered at St. Johns, by Mr. Justice Sicotte, as to the right possessed by a non-resident proprietor in the disposition of his school taxes.

The action was brought by the School commissioners of Lacolle against William Bowman, of St. Valentia. The defendant is the owner of property in Lacolle parish, on which he refused to pay taxes to the Commissioners, claiming the right to apply the amount to the support of the dissentient schools. The Commissioners contended that as he was only a proprietor and not a resident, he was not allowed by law the privilege of dissenting. Judge Sicotte has decided in favour of the defendant ; holding that it is the manifest intention of the law, whether the proprietor is or is not a resident, that he should have the right to dissent in the payment of his school taxes.

The following is the summary given by the Journal of Education of this judgment, and of the conflicting decision rendered some time ago by Mr. Justice Short :—

" The question is, whether a non-resident proprietor can or cannot legally declare himself a dissentient.

" The reasons on which Judge Short based his judgment were, if we recollect rightly, as follows : 1st. The word *inhabitant* can only mean a resident, and the law in giving the *inhabitants* forming the religious minority the right of dissent, had in view *residents* only ; 2nd, had it been intended to extend this right to non-resident proprietors, a clause to that effect would have been inserted, or the word *rate payer*, which occurs elsewhere in the same Act, would have been employed ; 3rdly, the right of becoming a dissentient is purely personal and exceptional, and should not be exercised except within the strict meaning of the law. The object which the latter has in view is to allow the minority of a municipality to send their children to such schools as they shall approve of, — a reason which does not apply to non-residents, who are not supposed to have any children within the municipality.

" The reasons on which Judge Sicotte's judgment rests may be summed up thus : 1st. The word *inhabitant* does not in the legal and administrative sense necessarily signify *resident*. Many authorities are cited to show that in the legislation of England and Canada the words *inhabitants* and *proprietors* or *land-holders* are looked upon as synonymous terms. 2nd. The

doubts which have existed in this country, and the lawsuits that have taken place in consequence, show that the word *inhabitant* has not always been held to mean a resident. The hon. Judge also cited (as confirming the view he has taken of the question) the Bill introduced into the Legislative Assembly with the assent of the Department of Public instruction, and which contemplated a settlement of this point. 3rd. The object which the law has in view in leaving every one free to dispose of his school taxes according to his own conviction being the removal of a source of religious animosity, all clauses of doubtful meaning should, as far as possible, be construed consistently with the attainment of this end; and the concession, like every other immunity favourable to the maintenance of order and the public peace, should be extended rather than restricted in its application. 4th. The proprietor, although he may not be a resident, is nevertheless a member of the municipal body to which the administration of the common interest belougs. He has, without doubt, under the law, a right to be heard and to vote at elections. He is a ratepayer and an elector, and consequently must have the same right as a resident to choose between the two school corporations, that of the majority and that of the minority. 5th. Assuming that the word *inhabitant* is used in the exclusive sense of *resident*, it is intended in the law to confer on residents only the right of forming a dissentient corporation; but this dissentient corporation once formed and established, it cannot have been intented to carry further the distinction between resident and non-resident ratepayers. and thus to deprive the latter of the right of paying their assessment to the corporation representing the religious minority to which they belong."

CORRESPONDENCE

OUR JUDICATURE SYSTEM.

MR. EDITOR,—I heartily concur in the remarks of your correspondent Q, in the October number of the Journal, as far as they go, and would now ask permission to make a few suggestions as to the best mode of reforming the evil complained of.

I think every person of experience will admit, that the root of all our difficulties is the system of *Enquête*. The objections to it are manifold,—it is secret, cumbrous, tedious and expensive, the judge, who has to determine the case eventually never sees or hears the witnesses,—and the witnesses themselves rarely or never pronounce the actual language recorded in the depositions. Then the number of depositions in many cases is unnecessarily great. And the *griffonnage* such in many instances as to render it almost impossible for the judge to appreciate the true meaning of what is actually recorded.

Now, if the system of *Enquête* in contested causes were entirely abolished, and each case were tried *before a judge*, in the same way that a case would be tried before a judge and jury,—*not here* (for we have unfortunately engrafted on our trial by jury a bastard system of *Enquête*),—but, as in England, the United States, Upper Canada, and in fact in every other part of the civilized globe where the system of trial by jury is practised,—*the judge himself taking full notes of all the essential points of the evidence*,—I venture to assert that justice would be more promptly, more correctly, and in every respect better administered, than it either is or could ever be hoped to be under a system so peculiarly Lower-Canadian as ours is. Not only would the judge have the advantage of seeing and hearing the witnesses, whose testimony he is called upon either to believe or to discard as unworthy of belief, but the witnesses themselves,—instead of uttering their testimony in a semi-secret form and subdued tone in a corner of the Court-room, or it may be even in an advocate's private office,—would have to proclaim their evidence aloud, in the face of the Court and Counsel and the assembled audience. No man, who has ever been called on to discriminate with regard to oral evi dence, can fail to admit the value of the latter mode of taking testimony, and to stigmatize the former mode as simply barbarous, if not iniquitous. Then we all know, from our own experience in trials by jury here, and from what we have seen and heard of the mode of conducting such trials in other countries, that the judge would have the additional advantage of *controlling* the evidence, both as regards its substance and its quantity, a point of very material moment in the due administration of justice. I would now suggest in what way, in our own district, our Courts might be organized to suit our proposed altered condition.

At present we have two classes of cases in the Circuit Court, the appealable and the non-

appealable cases. As the former can be carried to the Queen's Bench direct, without necessitating an intervening appeal to the Superior Court, there appears no sufficient reason for originating them in the Circuit Court: the result being merely to embarrass the efficiency of that Court, which is one essentially summary in its character. All cases of this class ought, I think, to be brought in the Superior Court, subject (as respects costs, either in the Court of original jurisdiction or in appeal) to the tariffs as they presently exist.

The sitting of the several Courts, in Montreal, might be as follows:—The Circuit Court from the first to the fifth of each month, except January, July and August. The practice division of the Superior Court from the tenth to the fifteenth of each month, except January, July and August. The Superior Court, for trials before Judges, in three separate divisions, from the seventeenth to the twenty-third of each month, and *in banco* as a Court of Review, from the twenty-fourth to the twenty-seventh of each month, except January, July and August. *And in all cases the Court should be be enjoined by Statute to commence business at Ten A.M.*

Under such a system I take it for granted that a considerable number of cases would be adjudged, at the time of trial, without resorting to that senseless practice of taking *en délibéré*. Then as cases either in the practice court or, although submitted for judgment without argument, at trial, may yet require examination by the judge, I would suggest, that, instead of their being taken *en délibéré* as it is called, the judgment should be held to be pronounced on the day it is asked for; in the same way that judgments are frequently pronounced *sauf a reviser*. We should thus rid ourselves of another senseless practice, that of proclaiming a long array of judgments in cases by default or equivalent thereto. Then, as to really contested causes, I would suggest, that there should be two adjournments for judgments in cases that have been tried, namely, to the last day of the month in which the Court is held, and to the next juridical day after the Circuit Court (except in January and July, when the adjournment ought to be to the equivalent day of those months), and an adjournment for judgments by the Court of Review. to the juridical day following the one last referred to. In this way ample opportunity would be afforded for mature deliberation in the more important cases, and for despatch in those of minor character.

In my proposed arrangements I purposely abstain from suggesting details as to the working beyond our own district, as I prefer to leave their consideration as respects other districts, and specially the country ones, to those who are more familiar with their particular wants.

In bringing these remarks to a close, I beg to invite the criticism of yourself and the members of the profession generally on my project, as my sole object is, to start discussion with respect to the present exceedingly unsatisfactory administration of justice in Lower Canada, and to secure, if possible, a remedy for the evils under which we are suffering.

Q. C.

THE IRISH BENCH.

To the Editor of the L. C. Law Journal.

SIR.—It appears that Lower Canada is not the only country blessed with *effete* judges.

We have suffered much, and truth compels us to say that certain judges, political hacks, in times past, have cost the country dearly. At present we are again suffering, witness the lamentable appearance of our highest court, but it appears that in Ireland they are not in a better condition than we are.

In the *London Times* of November 21st. is an article in which it is stated that upon the Commission for the trial of the Fenian prisoners, the three Irish Chief Justices have not been put because of incompetency; they have been passed by. The *Times* says:

"The Irish Bench seldom lacks one or two judges who ought long since to have retired. It was not long ago that the English ideas of the proper administration of justice were shocked by the presence on the Irish Bench of a judge who, in addition to

being past 80 years of age, was afflicted with blindness."

It adds that the Special Commission was resorted to "expressly to prevent the possibility of the Chief Justice of the Queen's Bench occupying the seat which seemed peculiarly his own." It goes on to say:

"It is painful to direct public attention to the infirmities of such a man, or to say anything which may give pain to himself or to his immediate friends and connections. But it is quite time that truth should be spoken on this subject, and we are only discharging a public duty by drawing attention to the actual state of things as regards the Head of the Common Law Courts in Ireland." "The result is what may be easily imagined in a 'Court where the Judge has become unable to direct, to follow, or even to remember the proceedings carried on before him."

Would that the Public Press would speak as openly upon the condition of things in Lower Canada.

It was truly said, in the Blossom case, "an Irish judge is as good as a Canadian judge."

The *Times* concludes its article as follows:—

"We should have been very glad if the Government had relieved us from the very painful duty of pointing out these things, though we can well understand the motives which have hitherto kept them silent. The tenure of office by a judge is a very delicate matter, and no action of Government is regarded with more jealousy than an attempt to create a vacancy in a place of which it has the disposal. But, whatever be the weight of these considerations, they ought manifestly to give way to a sense of what is demanded by public duty. There is no danger in the present day that the subject will suffer by the subserviency of the Judges to the Crown, but there is a great danger that the administration of justice may be occasionally rendered inefficient by the provisions of a law which, while carefully protecting the Judge from undue influence, leaves the subject at the mercy of the evils created by an improper tenacity of office. Few legal reforms would be more easy or more desirable than one which should fix a limit of age beyond which no judicial officer should retain his position. In England such a law is not greatly needed, for the judicial labour is so severe that every man must do his own work, and great vigour of body and mind alone suffices to bear the burden; but where, as in Ireland, it is the pleasure of Parliament to retain a superfluous judicial establishment, some precaution ought to be taken against the natural tendency to retain a place of easy work after the power to do that work has departed."

In Lower Canada we have several such judges, as last referred to, and when we see the stoppage of the administration of justice by reason of this fact we are led to look to the Government for a remedy to the evil; but remedy has been long, and seems likely to be longer delayed.

Your readers will observe, with a certain amount of surprise, that the *Times* has come to propose "a limit of age," such as Englishmen have always had in abhorrence, but such as exists in the United States. Theory has, in the long run, to yield to realities.

Yours,

Montreal, Dec. 8, 1865. T. R. S.

THE LAW OF COPYRIGHT.

A recent decision of the Lords Justices of Appeal in England, in the case of Low *v.* Routledge, in which the Copywright of a novel called "Haunted Hearts" was in question, affirms the important principle that "if an "alien book be first published in England, at "a time, when the author is first residing in "any part of the British dominions a valid "copyright may be acquired in such book," and consequently that any infringement of that right, such as the Messrs. Routledge were guilty of, was a piracy. Haunted Hearts was published in England while the author was residing at Montreal.

DECEMBER APPEAL TERM, MONTREAL.

Owing to the absence of the Chief Justice, judgment was rendered in eleven cases only during the sitting of the Court of Appeals at Montreal, in December. In eight of these cases judgment was confirmed, and in the other three reversed. In only two cases was there a dissenting judge. In one case the record was sent back to the lower Court, judgment having been prematurely rendered while a petition *en desaveu* remained undisposed of.

ADMISSIONS TO PRACTICE.—The following gentlemen, having passed satisfactory examinations before the Board for the District of Montreal, have been admitted to practice :

November 6th, 1865.—Joseph O. Desilets, Louis C. Taillon, J.-Bte. Lafleur, John Ronayne, N. W. Trenholme, J. M. P. Comte, J.-Bte. N. Vallee, Aug. Dagenais, E. H. Rixford, Lemuel Cushing, F. Corbell, A. Choquet.

Dec. 4th, 1865.—Michel Matthieu.

Jan. 2nd, 1866.—John Francis Leonard.

APPOINTMENTS, ETC.—Mr. R. A. R. Hubert has been appointed to the office of Prothonotary Superior Court and Clerk Circuit Court, Montreal, in the place of Mr. Coffin, deceased. Mr. Ermatinger to the office of Clerk of the Crown, in the place of Mr. Carter, Q. C., who has resumed practice at the bar. Mr. Brehaut has been appointed Police Magistrate for the District of Montreal.

OBITUARY NOTICES.

W. C. H. COFFIN.

William Craigie Holmes Coffin was born at Three Rivers in the month of March, 1800. His father was a merchant of Three Rivers and a Legislative Councillor; his mother was of a French family. Mr. Coffin studied law in the office of the late Mr. Justice Pyke, father of the present Deputy Prothonatary, and when Mr. Pyke removed to Montreal, in 1818, Mr. Coffin completed his term of study in the office of Sir James Stuart. After being admitted to the bar, he practised for some time at Three Rivers till he received the appointment of Prothonotary at that place. Here he remained till in 1844 he was appointed to the office of Prothonotary at Montreal, his colleagues being Messrs. Monk and Papineau. This appointment he continued to hold up to the time of his death, which occurred on the 30th December last.

By earnest and faithful discharge of duty and strict integrity of conduct, Mr. Coffin had gained the respect and esteem of the members of the legal profession and others with whom he was brought into contact in his official capacity, and his decease occasioned a very general feeling of regret.

ARCHIBALD McLEAN.

Though not a Lower Canadian lawyer, a brief notice of the late President of the Court of Appeal in Upper Canada, who died at Toronto on the 24th October last, may not be out of place. He was born at St. Andrews near Cornwall, in 1791, and was a pupil of Dr. Strachan, the present venerable bishop of Toronto, at the town of Cornwall. After studying law at Toronto, and seeing some active service in the war of 1812, he was admitted to practice in 1813. In 1837, was appointed one of the judges of the Court of King's Bench, and after various changes succeeded to the place of the late Sir John Robinson as President of the Court of Appeal and Error. Before his appointment to the Bench, he represented his native county for several years in the Legislative Assembly of Upper Canada, and was for some time speaker of the House. Though not eminent for legal attainments, his opinions were received with the respect due to experience and impartiality.

IS THE CROWN OBLIGED TO STAMP ITS PROCEEDINGS?

The following case, argued during the September term of the Court of Appeals, Montreal, possesses some interest.

QUEEN *v.* ELLICE.—In this suit, which was an appeal to the Q. B. from a decision of the Superior Court reversing an award of the Porvincial Arbitrators, it became necessary to make application for a judge *ad hoc*, Mr. Justice Drummond having recused himself. On the application for the nomination of a judge, the Clerk of Appeals demanded that the application and order should have a stamp affixed. This demand was resisted on the part of the Attorney General, and the Court ordered a hearing on motion on behalf of Appellant, that inasmuch as our Sovereign Lady the Queen is not liable for any duty or tax whatever, that the Clerk of Appeals should be forbidden to ask or exact any tax or fee whatever from Appellant in respect of the said suit, and that he should be obliged to receive all motions, petitions and applications made on the part of Appellant, without any stamp or stamps being affixed thereto.

RAMSAY, in support, said that the obligation to affix stamps was created by section 4, cap. 5, 27 and 28 Vic., and that there were two categories intended to cover every case in which fees were payable under any statute whatever. Subsection 1 of section 4 referred to those payable into the "Officers of Justice fee fund," and the other into the fund created by the "act to make provision for the erection or repair of Court Houses and Gaols at certain places in Lower Canada."

MEREDITH, J., said that there was no doubt as to the general principle that the Queen was not liable for a tax under a statute, if not specially named, unless some person had a conflicting interest. He wished to know if any one's salary depended on these fees.

RAMSAY was prepared to show that the general principle was such as Mr. Justice Meredith had stated, and he only alluded to the section 4 so particularly to show that there were two

classes of fees, in order to combat any distinction that might be attempted to be established between them.

MONDELET, J., said he had to interpret the statute judicially, and that he found it applied to every one, and that no exception was made as to the Queen.

RAMSAY, to clear away that difficulty at once, would answer the learned Judge by citing 2 *Dwarris*, p. 668, who says, "It is the rule that the King shall not be restrained of a liberty or right he had before, by the general words of an act of Parliment, if the King is not named in the Act." The clause 9 said that these fees should be taxes "payable to the Crown."

AYLWIN, J., cited the maxim "*Ecclesia ecclesiam non decimat.*"

DUVAL, C. J. The question is simply this, ha anybody an interest in the Crown paying these fees?

RAMSAY.—No; The Officers of Justice in Montreal are paid wholly independently of these fees. He was quite prepared to admit, that if an interest had been created in favour of any officer it would be a sufficient reason to make the Crown pay; but there was not now any such right. In conclusion, he would resume that the fee sought to be recovered belonged to the Officers of Justice fee fund, and that therefore no question could arise as to its being part of an appropriated fund; that by Section 9, these fees formed part of the revenue of the Crown, and that to force the Queen to pay for stamps was to force the Queen to pay the Queen; that Sections 12, 13, 15 and 29 all showed that the Statute did not intend, much less declare, that the rights of the Crown should be cut off; and finally, that the fines for not using stamps were payable totally to the Receiver-General for the general uses of the Province, and the prosecution was to be at the instance of Her Majesty's Attorney or Solicitor-General. In other words, that if the Queen did not pay a tax to the Queen, the Law Officers of the Crown should prosecute the Law Officers of the Crown, and the fines should be paid to the Receiver-General.

MARCHAND, Dep. Clerk of Appeals, resisted the motion. There might be contignent interests in these taxes reaching a certain amount; and at all events the balance of the Officers of Justice fee fund would go to the fund for the erection and repair of Court Houses and gaols if it exceeded what was required to pay all the Officers of Justice.

DUVAL, C. J.—But are any of your salaries dependent on these?

MARCHAND.—Not directly.

RAMSAY.—We have nothing to do with indirect interests. The only persons who seem to have any interest are the persons appointed to sell stamps; but their interest can hardily be considered as affecting the question.

DUVAL, C. J.—Certainly not. But what is the rule followed elsewhere as to charging these stamps?

RAMSAY.—They are not charged in the Police Court.

MARCHAND.—I was informed that they were. They are at all events charged.

RAMSAY.—The fees payable by the Crown have always been charged because the Clerk of the Crown had a percentage on them. It was one of the crimes charged to Mr. Delisle that he had charged these things, and it appears that the practice is continued even to the present day; but having been daily in the Police Court for the last three months it is certain that the stamps are not affixed in Crown cases.

The Court took the motion *en délibéré*, and no decision has yet been rendered.

LAW JOURNAL REPORTS.

COURT OF QUEEN'S BENCH—APPEAL SIDE—JUDGMENTS.

MONTREAL, December 7th, 1865.

PRESENT: Justices Aylwin, Meredith, Mondelet and Loranger.

MENECLIER DE MOROCHOND (defendant in the Court below), appellant; and GAUTHIER (plaintiff in the Court below), respondent.

HELD.—*That prescription does not run against the wife's claim for reprises matrimoniales while she is under marital authority.*

This was an appeal from the judgment of Mr. Assistant Justice Monk, rendered 27th Nov., 1864. The action was brought by the plaintiff, Ed. D. Gauthier, as universal usufructuary legatee of Marie F. Gauthier, for the amount of her *reprises matrimoniales* and dower, and also for an account of the community alleged to be subsisting between her and her husband, Meneclier. The judgment awarded the plaintiff $3,023 as the amount of the *reprises matrimoniales*, and $2,242 for what Marie F. Gauthier had inherited from her father, together with $500, the amount of her *douaire préfix*; but held that the community between Meneclier and his wife had been dissolved.

LORANGER, J. (who sat in this case as judge *ad hoc* instead of Mr. Justice Drummond) rendered the judgment of the Court of Appeals, unanimously confirming the judgment appealed from, the grounds of which were briefly as follows: By the contract of marriage between Meneclier and his wife, dated 18th July, 1822, it was stipulated that there should be community between them. There was *stipulation de propre des biens de la future* to be established by inventory within fifteen days from the date of the marriage contract. It was, moreover, agreed by the marriage contract that there should be a *douaire préfix* of $500. By judgment of the King's Bench, 8th June, 1826, a separation of property between Meneclier and his wife was pronounced. Madame Meneclier renounced to the community 15th June, 1826, and on the 19th Feb., 1826, the report of the

praticien establishing the *reprises matrimoniales* at $4,023 was homologated. For this sum, it was held that prescription did not run against Madame Meneclier during the existence of the marriage, and while she was under marital authority. The plea of thirty years' prescription against the wife's *reprises* was therefore dismissed. It was also held that though by his will, dated 4th Nov., 1856, Meneclier constituted his wife universal usufructuary legatee, with the condition that she was to discharge his debts, nevertheless, in this instance, there had been no confusion in her person of these debts due her by her husband. By will, dated 28th Dec., 1858, Madame Meneclier appointed the plaintiff her universal usufructuary legatee, and the latter had a right to claim the debts due by Meneclier to his wife at the time he died, and her dower as established by marriage contract.

Judgment comfirmed unanimously.

Lafrenaye & Armstrong, for appellant; Cartier, Pominville & Betournay, for respondent.

MONTREAL, December 9th, 1865.

PRESENT: Justices Aylwin, Meredith, Drummond and Mondelet.

SPAULDING *et al.* (plaintiffs in the Court below), appellants; and HOLMES (defendant in the Court below), respondent.

Petitory action. Dismissed owing to proof of plaintiffs' title not being sufficient.

This was an appeal from a judgment by Mr Justice Short, dismissing the plaintiffs' action which was instituted for the recovery of a small piece of land in the village of Rock Island, being part of Lot No. 1, 9th Range of the Township of Stanstead. The plaintiffs claimed that this portion of land formed a part of an irregular piece conveyed by Charles Kilborn to one Sylvanus C. Haskell in 1825.

DRUMMOND, J., referred to the description of the property as being extremely vague. The defendant's plea of description by ten years' possession in good faith, could not be maintained, as the plaintiffs resided on the other side of the line. After going over the pleadings and evidence at considerable length, his honour came to the conclusion that although the defendant had failed to prove title by prescription, yet as the plaintiffs had not succeeded in proving their title to the land claimed the judgment dismissing the action was correct.

Judgment confirmed unanimously.

R. N. Hall, for appellants; Sanborn & Brooks, for respondent.

GUERTIN, appellant; and O'NEIL, respondent.

Record remitted to the lower Court because judgment had been prematurely rendered.

DRUMMOND, J.—In this case the Court was not called upon to say anything as to the merits. The respondent brought a petitory action in the Court below, and the attention of the judges had been directed to the fact that the judgment in the Court of original jurisdiction had been pronounced while there was a petition *en desaveu* actually in the record and undisposed of. This petition was regularly made on the 13th October, 1863. The judgment was premature and must be set aside without any opinion being given on the merits of the case. The record must be remitted to the Court below that the petition may be adjudicated on. No rule would be made as to costs.

BOWKER (defendant in the Court below), appellant; and FENN (plaintiff in the Court below), respondent.

HELD.—*That a promissory note is considered to be absolutely paid and discharged if no action be brought thereon within five years from maturity, and that prescription is not interrupted by an acknowledgment of the debt in writing, or a payment on account within said five years.*

AYLWIN, J., dissenting, said in this case he could not concur in the judgment about to be rendered. The action was brought to recover $391,66, the balance of a promissory note, and $56,30 on an account, making in all $447.96. Judgment was rendered in favour of the plaintiff. The first plea set up prescription against the note, which bore date 15th Sept., 1856, the action being brought 16th July, 1862. The second plea admitted that the defendant had received teeth from the plaintiff to the value of $40, being two of the itens charged under date September, 1856, and sought to be recovered; but alleged that this sum, and certain other charges in the account, were overpaid by the sum of $50, improperly credited by the plaintiff on the note. That the expenses charged in the account should have been detailed. The plea then alleged that the plaintiff, as agent of the defendant, had agreed to get possession of certain lands in Lima, in the State of New York, under a power of attorney, dated some 8 years previously, but had failed to do so; alleging, also, that damage had accrued to the defendant by the plaintiff's neglect. No evidence was adduced to support these allegations. To the first plea the plaintiff fyled special answers. 1st. Alleging interruption of prescription by acknowledgment to owe and promise verbally and in writing to pay, and that "he had paid the plaintiff monies on account thereof, and on the interest accrued thereon." 2nd. An answer setting up that at the date of the note, the defendant was indebted to the plaintiff in $348.16 for money lent and advanced, goods sold and interest accrued, and that for such indebtedness he gave the note sued on, which he failed to pay. There had been an examination of the defendant on *faits et articles*. The 62nd question was to this effect: Is it not true that you have within the period of five years immediately preceding the institution of this action, given the plaintiff to understand, in some way or an other, that you would pay him the amount due him on the said promissory note? The defendant's answer was: I have written what was in the letter sent by me. I have not made any acknowledgment or promise to pay the note since it was acknowledged, or before, as a par-

ticular debt or note. This answer, taken with other answers of the defendant, was to his honour's mind perfectly sufficient to establish an acknowledgment of the debt. It was argued. and it would be decided by the majority of the Court, that the prescription was a perfect bar to the action. His honour referred to the case of Russell and Fisher, 4 L. C. Rep. p. 237, Pothier, Traité des Obligations, No. 846, &c., in support of his opinion that the prescription was interrupted by the defendant's promise to pay contained in letters written to the plaintiff.

MEREDITH, J., observed that the case was one of great importance. After giving the subject due consideration, he thought the decisions under the English statute tended rather to embarrass than to aid us in determining the course to pursue under our own law. In this there was nothing surprising, because the two laws are worded so differently as to lead to the belief that the framers of our law, aware of the conflicting decisions under the English statute had determined not to take it as their mode lest the Canadian law should share the fate of the English original. The terms of our statute were in effect that any promissory note, made after 1st August, 1849, shall be held to be absolutely paid and discharged, if no suit or action has been brought within five years. The fact of the maker of the note having paid a part on account during the five years did not tend to weaken the presumption that the whole was paid, when no action was brought within the five years. The respondent tried to interpret the statute as if it contained the words "provided that an acknowledgment or part payment of any note within the five years shall take the note out of the reach of the statute." The law contained no such proviso. His honour was quite aware that a strict interpretation of the terms of our statute might bear hard upon individuals, and it bore hard upon the respondent in the present case; but the remedy was with the Legislature. The conflicting decisions in England showed the danger of stretching the plain meaning of the statute. The court could not avoid holding that the note sued on was absolutely paid and discharged, but judgment would go in favour of the respondent on the open account. The judgment now rendered, his honour remarked, could not serve as a guide in future, as the code would introduce modifications of the law.

DRUMMOND, J., said it was with very great regret that he had come to the conclusion that the action was barred. He looked upon the law as dishonest and immoral, but he had always felt very great apprehension at any endeavour to break through a statute.

MONDELET, J., said he was clearly of opinion that our statute applicable to promissory notes was as stringent as the ordinance with reference to arrears of *rentes constituées*. There was a total extinction of indebtedness. The law was imperative. His honour had some doubt whether the acknowledgment of indebtedness and promise to pay applied directly to the note in question. No decision would be given on the question of *faits et articles*, which arose in the case' as it was not required. Judgment reversed. Judgment for plaintiff for $40, and costs as of an action for that sum, with costs of appeal in favour of appellant.

A. & W. Robertson, for appellant; Snowdon & Gairdner, for respondent.

MONTREAL ASSURANCE CO. (plaintiffs in the Court below), appellants; and MACPHERSON (defendant in the Court below), respondent.

HELD.—*That service of writ and declaration at a place different from that alleged in the writ to be defendant's domicile, is insufficient.*

This was an appeal from a judgment rendered by Mr. Justice Monk, maintaining an *exception à la forme* fyled by defendant, and dismissing plaintiffs' action. The facts were as follows: The defendant being resident in Upper Canada, the plaintiffs obtained leave under C. S. L. C. Cap. 83, Sec. 63, to have the writ and declaration served there. In the preliminary affidavit, produced on behalf of the plaintiffs, with a view to such service, it was alleged that "the said defendant now resides in the city of Toronto." Besides this the defendant was described in the writ and declaration as "now of Toronto, in the Home District of Canada West." The person making the affidavit of service declared "that I served the within writ of summons and declaration thereto attached on the defendant therein named *at the township of York, in the County of York*, in the Province of Upper Canada, by delivering to Mrs. D. L. Macpherson, the wife of said defendant, *at his place of residence, in said township of York*, true copies, &c." The defendant fyled an *exception à la forme*, alleging that the writ of summons was null and void, not having been returned into court within thirty days after service, being the time limited in the endorsement upon the writ. Further, that the affidavit of service showed that the service had been made at a place wholly different from that described in the writ and declaration as the residence and domicile of the defendant. The Court below, allowed the plaintiffs to amend the endorsement on the writ, and extended the time to forty days, but, holding the service to be insufficient, maintained the *exception à la forme*, and dismissed the action. The plaintiffs appealed from this judgment.

MEREDITH, J., dissenting, said it was contended, on the part of the respondent, that the judgment appealed from must be confirmed, unless it he held that service may be made at a place wholly different from that described in the writ and declaration as the residence and domicile of the defendant. His honour believed it was not impossible to make a legal service of process at a place wholly different from the place described in the declaration as the domicile of the defendant. For it was quite possible that the defendant might change his residence between the issuing of the writ and the service of process, and in such case the service of process would be necessarily made at a place different from that stated in the writ. If the de-

fendant were wrongly described in the writ, he could complain on that ground, but the objection now made was that the service was not made at the place stated in the writ to be defendant's domicile. His honour was of opinion that the service at the defendant's place of residence was sufficient.

DRUMMOND, J., did not think it necessary to pronounce any opinion on the motion to amend the endorsement on the writ, because it appeared to him that the return of service was bad. He did not think the respondent went too far in saying that the writ might as well have been served at Gaspé Bay. It might be a hard case, as prescription was obtained against plaintiffs' demand, based on promissory notes, but he could not view it otherwise than as a matter of law and practice.

MONDELET, J., was of opinion that the defect in the service could not be overlooked, and that the judgment appealed from was correct.

AYLWIN, J., read the judgment of the Court confirming the judgment appealed from, but making an alteration in the *motifs*, which would now read as follows;—"Seeing that the service of the writ and declaration is insufficient, and is contrary to the 63rd section of 83rd chap. Consol. Stat. L. C., p. 733, the Court doth affirm the judgment."

Judgment confirmed, Meredith, J., dissenting.

Cross & Lunn, for appellants; Rose & Ritchie, for respondent.

ROTHSTEIN (claimant in the Court below), appellant; and DORION, Atty. General *pro regina* (informant in the Court below), respondent.

HELD.—*That the onus of proof under C. S. C., cap.* 17, *lies on the claimant to establish that the goods claimed are not liable to forfeiture.* 2. *That where the forfeiture does not exceed* $200, *the same may be prosecuted in either Circuit or Superior Court.*

This was an appeal from the judgment of the Superior Court, declaring certain goods to be forfeited for contravention of the Customs laws. The appellant was foreclosed in the Court below, and the judgment rendered without proof on either side The present appeal was brought on the following grounds: 1st. The information was not igned by the Attorney General, but by an attorney for the Attorney General, which had been held to be a fatal defect in an information. 2nd. The information should have been brought in the Circuit Court, the value of the goods seized being alleged to be $200 only. 3rd. Because no proof had been made of the information. The respondent answered these objections by citing the clauses of the Statute, C.S. C., cap. 17, sec. 73, "If the amount or value of any such penalty or forfeiture does not exceed $200, the same may *also* be prosecuted, sued for and recovered in any County Court or Circuit Court, &c." And as to the burden of proof not being on the informant, the respondent cited sec. 84 of the same statute: "If any goods are seized, &c., the burden of proof shall lie on the owner or claimant of the goods, and not on the officer who has seized and stopped the same, or the party bringing such prosecution."

AYLWIN, J., said it was not correct for an attorney to sign the information as attorney for the Attorney General. But the objection should have been raised by a proper *exception à la forme*. There was nothing of the kind in the record, and the judgment must be confirmed.

MEREDITH, J., alluded chiefly to the pretension of the appellant that the informant was bound to prove at least that the goods claimed were subject to duty, and were imported into the Province; and that under the English statute, which was nearly the same as our own, in no case could judgment be rendered without proof. His honour was of opinion that the appellant's pretensions were not sustained by the authorities cited, and that in a case such as this it was for the claimant to adduce evidence to establish that the goods are not liable to forfeiture.

Judgment confirmed unanimously.

B. Devlin, for appellant; V. P. W. Dorion, for respondent.

BRONSDON (defendant in the Court below) appellant; and DRENNAN (plaintiff in the Court below), respondent.

HELD.—*That the undermentioned letter was a sufficient and binding guarantee.*

This was an appeal from a judgment rendered by Mr. Justice Smith, in favour of the respondent. The action was brought on the following letter of guarantee which the appellant had given to the respondent for goods to be supplied to the firm of C. F. Hill & Co., consisting of C. F. Hill and J. L. Bronsdon, the latter a son of the appellant.—"Montreal, 11th August, 1860, S. P. Drennan, Esq., Sir, I hereby agree to become security for Messrs. C. F. Hill & Co., for whatever furniture you may trust to their care. (Signed,) J. R. Bronsdon." The declaration set up that under this letter of guarantee the plaintiff consigned to C. F. Hill & Co. large quantities of furniture for which they failed to account in full, and on the 1st July, 1863, a balance of $1534.80 remained due, of which defendant was notified. On the 17th Aug., 1863, plaintiff made a notarial demand on defendant, requiring him to pay within two days, in default whereof he would sue C. F. Hill & Co., at defendant's risk and cost. Defendant did not pay, and plaintiff obtained judgment against C. F. Hill & Co., for $1,382 on which execution was sued out, and return made of *nulla bona* and no lands. The plaintiff then brought this suit against defendant to recover what was due within the terms of the letter of guarantee. The plea was that the document termed a letter of guarantee merely expressed the defendant's willingness to become security, but that plaintiff had never informed defendant that he accepted the letter of guarantee, and nothing was ever done to complete the obligation. Further, that defendant wrote the letter in question on the faith of one James Mathewson becoming security jointly with the defendant, and he had not done so. The judgment of

the Superior Court condemned the defendant to pay $1508, being the amount of the debt, interest and costs in the suit against Hill & Co. From this judgment the present appeal was instituted.

MEREDITH, J., said that after examining the case carefully, the Court was of opinion that the letter in question was a sufficient letter of guarantee, and, secondly, that the evidence was sufficient to show that the debt claimed was for goods delivered under the letter of guarantee.

MONDELET, J., was of opinion that the proof fully established that the furniture would never have been entrusted to C. F. Hill & Co. by plaintiff, except on the faith of the letter of guarantee.

Judgment confirmed unanimously.

Day & Day, for appellant; Cross & Lunn, for respondent.

MCPHEE (plaintiff *par reprise d'instance* in the Court below), appellant; and WOODBRIDGE (defendant in the court below), respondent.

HELD.—*That an action directed against an executor, to recover moneys received by him on account of the estate, must be in the form of an action to account, even though the plaintiff claim but one sum as due to the estate.*

This was an appeal from a judgment of the Superior Court, rendered by Mr. Justice Loranger, dismissing the plaintiff's action. The action was instituted in the name of John Rankin, as curator to the vacant estate of the late Duncan Campbell, against the widow of Dr. Alexander, one of the executors of Duncan Campbell, to recover £1582 said to have been received by Dr. Alexander as executor. There had been three executors, and these executors in 1832 had sold a lot of land for £730, of which £175 was paid down. Two of the executors died, but Dr. Alexander, it was alleged, continued to receive the interest on the balance of purchase money up to 1858, when he also died. The plea of defendant was that she was not liable to plaintiff, because his appointment as curator was null. That the estate of Duncan Campbell was not vacant, he having named universal legatees in his will, to whom the executors jointly were liable to account for their gestion. Rankin having resigned his curatorship, Norman McPhee was appointed curator, and took up the *instance*. The action was dismissed on the ground that universal legatees had been appointed by the will of Duncan Campbell, and there was no proof in the record that his succession had become vacant, and therefore the nomination of plaintiff as curator must be looked upon as null. From this judgment plaintiff appealed, submitting that the *onus* of proof to establish the nullity of plaintiff's appointment as curator lay upon defendant, and that the action was in reality an action to account, being brought for the only sum due the estate.

DRUMMOND, J., said the Court did not feel called upon to pronounce any opinion on the validity of the plaintiff's appointment as curator. For his own part, it seemed to him that in most cases the curator ought to be looked upon as the legal representative of the estate till the *curatelle* had been set aside. But there might be cases in which it would be evident on the face of the papers, that the appointment had been improperly made. The judgment must be confirmed on the ground that the action was brought for a special sum. An action could not be properly brought against an executor for a special sum of money; for though it might be true that he had received £500, yet he might have spent £10,000. The proper action was an action to account. The judges were all agreed on this point.

Judgment confirmed unanimously.

Cross & Lunn, for appellant; A. & W. Robertson, for respondent.

OUIMET (defendant in the Court below), appellant; and GAMACHE (plaintiff in the Court below), respondent.

Question of evidence.

This was an appeal from a judgment awarding plaintiff £61, for plastering, &c., done to a church. The plea to the action was that the plaintiff had undertaken all the work required to be done for the stipulated price of 13d. per yard, including the Gothic work, &c., which price had been paid to plaintiff. The answer to this was that the plaintiff was entitled to double the ordinary rate for Gothic work. Evidence was adduced, the plaintiff's witnesses stating that the usage was to allow double for Gothic work, and the defendant's witnesses alleging the contrary. Judgment being rendered in favour of plaintiff in the Court below, the defendant appealed.

MONDELET, J., was of opinion that the proof made by plaintiff was not sufficient to establish that he was entitled to double for the Gothic work. The judgment of the Court below mus therefore be reversed, and the action dismissed.

Judgment reversed unanimously.

Loranger & Loranger, for appellant; L. Ricard, for respondent.

GIARD *et al.*, *es qualités* (plaintiffs in the Court below), appellants; and LAMOUREUX [defendant in the Court below], respondent.

HELD.—*That when one of the defendants to an action on a promissory note proves that the note has been paid, the action should be dismissed as to both, though the other defendant made default.*

This was an appeal from a judgment of the Court of Review at Montreal on the 25th of January, 1865, reversing a judgment of the Circuit Court at Sorel. The action was brought on a promissory note against the defendants, of whom the respondent was one, by the plaintiffs in their quality of testamentary executors of the payee. One of the defendants, Dandelin, pleaded prescription and payment, but the other [now respondent] made default. The judgment of the Circuit Court at Sorel dismissed the plea of payment raised by Dandelin, but held that the action was barred by the five years' prescription, and dismissed the action

against Dandelin, but condemned the other defendant, Lamoureux. by default. The case was then taken before the Court of Review by Lamoureux, and the Court of Revlew, holding that the plea of payment had been established, reversed the judgment against Lamoureux and dismissed the action as to him also. The plaintiffs in the suit now brought the case before the Court of Appeals, submitting that a defendant who had made default in the Court below could not avail himself in the Court of Review of a plea which had been made by another defendant and dismissed.

DRUMMOND, J., was of opinion that the plea of payment having been proved by one of the defendants, the other could not be condemned to pay the debt over again.

MEREDITH, J. The fact of the note having been paid should have caused the action to be dismissed as to both defendants. The judgment of the Court of Review must therefore be confirmed. Judgment confirmed unanimously.

Sicotte & Rainville, for appellants; Lafrenaye & Bruneau, for respondent

GRAND TRUNK COMPANY (defendants in the Court below), appellants; and CUNNINGHAM (plaintiff in the Court below), respondent.

HELD.—*That a person purchasing from a Railway Company a ticket which is declared to be wood for a specified term, enters into a special contract which is at an end as soon as such term has expired; and the holder of a return ticket attempting to return after the expiration of the term for which the ticket was issued may be lawfully ejected from the train, on refusal to pay full fare.*

This was an appeal from a judgment rendered, 31st Dec., 1864, by Mr. Justice Berthelot, rejecting a motion for a new trial. The plaintiff instituted proceedings 6th April, 1863, for $300 damages alleged to have been sustained in consequence of his illegal expulsion from the cars of the Company on the 8th Nov., 1861, while returning from Montreal to Acton Vale, where he resided. The circumstances were as follows; On the 6th Nov., 1861, the plaintiff purchased a return ticket from Acton Vale to Montreal and back, for which he paid $2.50, the ordinary fare each way being $1.75. On the ticket was printed, "Good for day of date and following day only." The plaintiff proceeded to Montreal on the 6th Nov., but did not embark on the train to return till the 8th. When the conductor came round, the plaintiff presented his return ticket. The conductor informed him that it was out of date, and read to him his instructions forbidding him to accept return tickets that were out of date. He demanded the full fare for returning, $1.75. The plaintiff refusing to pay, was put off the cars at Charron's Station. The plaintiff having brought an action of damages, the case was tried before a jury. Mr. Justice Smith, who presided, charged the jury that the Company could not make a distinction between passengers, it being proved that on other occasions conductors had accepted return tickets that were out of date. The jury found a verdict for $100 damages. The defendants then moved for a new trial on the ground that the verdict was contrary to the evidence, it being established that there was a special contract that the ticket was good for two days only; and also on the ground of misdirection by the presiding judge. This motion being rejected, the present appeal was instituted.

DRUMMOND, J., after stating the facts of the case, said: The judges of the Court of Appeals are unanimous in taking a different view of the case from the judges of the Court below. We consider that there was a special contract entered into voluntarily between the respondent and the Grand Trunk Company. The former was bound to avail himself of the ticket within the time specified. It is true that no notice was posted up that the rule as to return tickets would be strictly adhered to, but I do not think that it was necessary for the Company to post up a notice of a rule printed on the ticket. I can account for the verdict only by the strange prejudice which some people have against companies—companies without the existence of which we should have to return to a state of barbarism. If a conductor did allow persons on certain occasions to pass on a spent ticket, is the fact of a conductor neglecting his duty any reason why other people should expect to pass on expired tickets?

MONDELET, J., remarked that if the plaintiff's pretensions were maintained, the result would be the constant evasion of a rule which the Company had a right to enforce.

MEREDITH, J. The evidence in this case instead of establishing a *usage* simply establishes the existence of an *abuse*.

AYLWIN, J., pronounced the judgment of the Court—seeing that the verdict was contrary to evidence, and that the presiding judge should have charged the jury to find a special contract, and that the ticket was spent and useless, verdict set aside and a new trial ordered.

Judgment reversed unanimously.

Cartier & Pominville, for appellants; Perkins & Stephens, for respondent.

INDUSTRY VILLAGE BUILDING SOCIETY (plaintiffs in the Court below), appellants; and LACOMBE, *père* (defendant in the Court below), and SCALLON (opposant in the Court below), respondent.

Question of evidence as to certain payment.

This was an appeal from a judgment rendered at Joliette by Mr. Justice Bruneau, 18th March, 1861, maintaining the opposition of Scallon, opposant, which had been contested by the plaintiffs, on the ground that Scallon had previously been paid the amount claimed by his opposition.

MONDELET, J., said there was no difficulty in the case. The opposant's claim had not been extinguished at the time the opposition was fyled.

Judgment confirmed unanimously.

Pominville & Godin, for appellants; Leblanc & Cassidy, for respondent.

QUEBEC, 20th Dec., 1865.

PRESENT:—Duval, C. J., Aylwin, J., Meredith, J., Drummond, J. and Mondelet, J.

Ex parte W. W. BLOSSOM.—BAIL FOR MISDEMEANOURS.—The Court gave judgment on the application of the prisoner Blossom, to be admitted to bail under the following circumstances: On the 7th Aug., 1865, the petitioner Blossom, and three others, were arrested at Montreal in an attempt to kidnap Mr. George N. Sanders, with the object of transmitting his person within the territory of the United States, a large reward having been offered for his apprehension by the United States Government. The prisoners were regularly committed on the 16th Aug., and at the ensuing term of the Court of Queen's Bench at Montreal, an indictment for conspiracy to kidnap Mr. Sanders, with the usual averments of assault, &c., was found against them, to which they pleaded not guilty, and on the following 4th Oct., they were put upon their trial. This trial lasted from the 4th to the 9th Oct., when the jury was discharged, having been unable to agree, after a deliberation of three days. The prisoners were remanded for a second trial, with a new panel of jurors, which commenced on the 17th October, and continued until the 30th October, the last day of the Sessions, when the second jury was also discharged, having been unable to agree upon a verdict, after a deliberation of nine days.

Upon both trials, Mr. Justice Mondelet, the presiding judge, charged strongly for a conviction, intimating to the jury that the evidence left no room to doubt the prisoners' guilt; and after the discharge of the second jury on the 30th October, he made the following order: "The Court, in consequence of the non-agreement of the jury to a verdict, discharged them, and it is hereby adjudged and ordered that the four prisoners be remanded to the common gaol of this district. And whereas, from the positive evidence adduced at this trial, the said prisoners are not entitled to be bailed, it is adjudged and ordered that they do stand committed to the gaol of this district without bail or mainprise, to stand their trial at the next term of this Court, and not to be discharged without further orders from this Court."

An application was soon after made in Chambers to Mr. Justice Monk, of the Superior Court, to admit the prisoners to bail, but was rejected by that judge on the ground that he had no jurisdiction, the prisoners being detained under an order of the Court of Queen's Bench. At the same time he expressed his own opinion that the prisoners were entitled to be bailed. A fresh application was then made to Mr. Justice Badgley in Chambers, and granted, Judge Badgley being of opinion that the prisoners were of right entitled to be bailed, and that the order did not deprive him of jurisdiction. The prisoners failed to give bail till the writ had lapsed, and a new application on behalf of W. W. Blossom was then made before the Court of Queen's Bench sitting in appeal at Montreal. The Chief Justice was not present, and on the 9th December it was announced that the Court was equally divided on the application. A re-hearing was then ordered to take place at Quebec at the term of the Court of Appeals in that city. On the last day of the term at Quebec, the full Bench of five judges being present, judgment was rendered granting the application of Blossom to be admitted to bail, himself in £500, and two sureties in £250 each, Mr. Justice Aylwin and Mr. Justice Mondelet dissenting. The judgment of record does not disclose the grounds. The following extracts, however, from the opinion of Mr. Justice Meredith, who concurred with the majority of the Court, embrace most of the points which arose in the course of the argument:—

"The offence with which the prisoner stands charged is, it is admitted, a misdemeanour, and by the indictment found against him, he is accused of having conspired with certain other persons 'to steal and carry away one George 'N. Sanders out of the city of Montreal, and 'from out of this Province, where he, the said 'Sanders, was then and there living and re-'siding, into a foreign State, to wit, the United 'States of America, against the will and con-'sent of him, the said George N. Sanders.' Upon this indictment the prisoner has been twice tried, without the jury being able to agree, and the first question to be considered by us is this:—Under the circumstances already mentioned, ought the prisoner to be admitted to bail?

"For the present, I shall leave out of sight the order made by the learned Judge before whom the prisoner was tried, and I shall consider the question, firstly, with reference to the jurisprudence of the Courts in England before the passing of the English Statute 11 and 12 Vic., cap. 42, and at the same time I shall take occasion to notice the authorities placed before us by the learned Crown prosecutor. I shall then consider the question, secondly, with reference to the Statute law of England, from which our own Statute on the subject has been taken; and, thirdly, with reference to our own Statute on the subject.

"Before, however, adverting to the decisions of the English Courts, I desire to quote a provision of our own law, securing to us the benefit of the writ of Habeas Corpus, which makes it our duty to consider with even more than ordinary care the judgments of the English Courts on this subject. I advert to the first section of that law, which is as follows: 'all persons com-'mitted or detained in any prison in Lower 'Canada, for any criminal or supposed criminal 'offence, shall of right be entitled to demand 'and obtain from the Court of Queen's Bench, 'or from the Superior Court, or any one of the 'judges of either of the said Courts, the writ of

'Habeas Corpus with all the benefit and relief 'resulting therefrom, at all such times, and in 'as *full, ample, perfect* and *beneficial* a manner, 'and to all *intents, uses, ends, and purposes* as Her 'Majesty's subjects within the *realm of England*, committed or detained in any prison 'within that realm, are there entitled to that 'writ, and to the benefit arising therefrom by 'the common and Statute laws thereof.'

"The foregoing emphatic declaration of the Legislature makes it our duty to inquire whether, at the time of the passing of our Habeas Corpus Act, a subject of Her Majesty within the realm of England, if detained in prison there, under circumstances similar to those under which the prisoner as now detained here, would have been entitled to give bail.

"Sir Matthew Hale, than whom a higher authority cannot be cited, laying down the law upon the subject of bail, says: 'regularly in 'all offences, either against the common 'law or acts of Parliament, that are *below* '*felony*, the offender is *bailable*, unless, 1st, he 'hath had judgment, or, 2nd, that by some 'special act of Parliament bail is ousted.' Here it is to be observed that the word *bailable* in the foregoing passage is construed by Blackstone, vol. 4, p. 298, as signifying that the party *ought to be admitted to bail;* and it is in that sense that it is generally used by the writers on this subject.

"The rule laid down by Chief Justice Hale was acted upon by the Court of Queen's Bench in the time of Chief Justice Holt, as will be seen on reference to 1 Salkeld, p. 104, where Mariott's case is reported as follows:

"Mariott was committed for forging endorse-"ments upon Exchequer bills, and upon a Ha-"beas Corpus was bailed, because the crime "was *only a great misdemeanor;* for though the "forging the bills be *felony*, yet forging the "endorsement is not." This case, decided in 1698, is of itself sufficient to show that the distinction between felonies and misdemeanors with respect to the right to be admitted to bail, is not, as has been contended, an invention of modern times; the truth being that that distinction is to be found in our earliest statutes on the subject.

[Judge Meredith next alludes to the following cases: Queen vs. Tracey, decided in 1705, 6 Mod. Rep., p. 31. The case of John Wilkes, decided in 1768, 19 State Trials, p. 1091. In this case Lord Mansfield said that he knew of no case where a person *convicted of a misdemeanor* had been admitted to bail without the consent of the prosecutor. Rex vs. Judd, Leach Crown Law, p. 484, decided in 1788. In this case the president of the Court of King's Bench in England observed, 'unless it appears upon the face of the commitment that the defendant is charged with *felony*, WE ARE BOUND to discharge him by the Habeas Corpus Act.' Case of Rex *v.* Marks, 3 East Rep. p. 165. Case of Regina *vs.* Badger, 4 Q. B. Rep. Ad. & El. p. 418, in which Lord Denman, as the organ of the Court, speaking of the prisoner and of his offer to give bail, observed: 'Standing charged with a *mis-'demeanor*, O'Neal claims *the right of every man* 'so charged to be released from prison, and so 'admitted to bail on giving sufficient securities.' Case of the Wakefields, Burke's Trials, p. 376. Lastly the case of Linford and Fitzroy, 66 Eng. C. L. R., p. 242. Judge Meredith continued as follows:—]

"The statement of Lord Denman (in the last cited case) 'that for many years the received opinion and practice has been that all persons accused of misdemeanor, whether common or otherwise, are entitled to be admitted to bail, is strongly confirmed by the fact that although we have reason to believe the most diligent search has been made by the learned Crown Prosecutor, not a single case of misdemeanor has been cited in which bail was refused before conviction.....

"I shall now in connection with the decisions of the English Courts, advert to the more important of the authorities cited by the learned Crown Prosecutor, as tending to show that a distinction, under the Statute of Westminster, was made between enormous misdemeanors and common misdemeanors with respect to the right to be admitted to bail. The passage from the 15th Chapter of Hawkins' Pleas of the Crown, doubtless a standard authority, supports the distinction contended for by the Crown in this case and the opinion of Serjeant Hawkins is quoted approvingly in Chitty's Criminal Law, and in Burns' Justice. It may, however, be observed that the limitation which Serjeant Hawkins suggests should be put upon the general words of the statute, which are: that persons guilty 'of some other trespass for which one ought not to lose life nor member are replevinable.' has not the support of Lord Cook's commentary on the same statute, which Matthew Hale says he has transcribed; that the opinion of Serjeant Hawkins is expressed doubtingly, as appears by the words '*sed quere*' added to the most important part of it; that the authorities cited by the learned Serjeant were very old even at the time he wrote, the only reporter referred to by Hawkins being Keilway, of the time of Henry VIII; and that the last case tending to support the distinction made by Hawkins is the Queen *v.* Tracey, decided in the time of Queen Anne..... It is also to be recollected that the opinion of Serjeant Hawkins is founded exclusively upon the statute of Westminster, which is no longer in force in England or in this country; and it does seem to me that no one can interpret our own statute, according to the rules observed by Serjeant Hawkins in interpreting the statute of Westminster, without coming to the conclusion that, at least, no Justice of the Peace can refuse bail in a case of misdemeanor.....

"Authorities were also cited as showing that the Court of Queen's Bench, in the plenitude of its power, may exercise an almost unlimited

power as to the admitting of prisoners to bail. But I understand those authorities as establishing that the Court of Queen's Bench may take bail in cases even of the greatest magnitude, but not as declaring that that Court could, consistently with justice, refuse bail in trivial misdemeanors."

[His Honor next considers the question as to whether the prisoner ought to bailed with reference to the statute law of England from which our own statute has been taken, and arrives at the conclusion, " that in England under 11 and 12 Vic., Cap 42, a Justice of the Peace would be bound to accept sufficient bail if of fered by any person charged with a misdemeanor, such as that of which the prisoner is accused, *however clear the proof* might be against him." His Honor then adverts to the Canadian Act, C. S. C. Cap. 102. We extract the following :—]

" The last clause of the section (53) is particularly deserving of attention ; it is : ' and *in default* of such person procuring sufficient bail, then such justice or justices may commit him to prison.' Here the default of a person accused ' to procure sufficient bail' is in express terms made the condition upon which it shall be in the power of the justice, to commit him to prison. All doubt, however as to the obligation under our statute of a Justice of the Peace to accept bail from a person accused of misdemeanor seems to me to be removed by the 57th section which contains the words, ' or if the offence with which the party is accused be a misdemeanor, then such Justice *shall* admit the party to bail, as hereinbefore provided.' This is the provision of our law which makes it obligatory upon Justices of the Peace to accept bail in cases such as the present ; and as has been well observed by Mr. Justice Badgley, ' the section 53 does not regulate the principles of admitting to bail, but determines by whom it may be exercised, namely by one Justice.'.....

" It has also been contended that the rule making a distinction between felonies and misdemeanors, with respect to the right to be admitted to bail, is a most unreasonable one, and ought not to be followed by this court. But we know that the distinction between felonies and misdemeanors runs through the whole body of our law, and that we meet it at every stage of the proceedings in bringing offenders to justice... One of the advantages which results from the division of offences into felonies and misdemeanors is that it enables the Legislature to lay down a certain rule with respect to the taking of bail in a large class of cases."..... .

[His Honor proceeds to consider the order made by Mr. Justice Mondelet while presiding in the Court of Queen's Bench, Crown side. We make the following extracts from his observations :—]

" If to-morrow the prisoner could make his innocence clear beyond the possibility of a doubt, it would be in vain for him to do so. No judge could give him the benefit of the writ of *habeas corpus*, so as to bail him..... I therefore deem the order objectionable, because for a period of nearly six months it placed the prisoner, charged with a misdemeanor, but *not* convicted, in the same situation with respect to bail, as if he had been convicted. In this respect I cannot avoid thinking the order unjust, and, so far as I know, it cannot be supported by even a single precedent.....

" I shall conclude by recapitulating the points which I think have been established in the course of the foregoing observations. They are as follows:

1st. That according to the well-established jurisprudence of the Courts in England, before the passing of 11 and 12 Vic., chap. 41, prisoners charged with misdemeanors were entitled to be bailed, the words of Lord Denman in the last reported case decided under the old law being, ' for many years the received opinion ' and practice has been that *all* persons accused ' of *misdemeanors*, whether *common or otherwise*, ' are *entitled* to be bailed.'

2nd. That under the English Statute 11 and 12 Victoria, chapter 42, a Justice of the Peace could not refuse bail in a case such as the present.

3rd. That by our statute, chap. 102, C. S. C., Justices of the Peace are bound to take bail in all cases of misdemeanor.

4th. That this Court, at the close of the term, could not consistently with reason refuse to take bail in any case in which, under the statute, a Justice of the Peace is bound to take bail, the statutory directions to Justices of the Peace having always been regarded by the Courts as " the common landmarks " by which they ought to be guided in deciding applications to be admitted to bail.

5th. That there is nothing in the order of Mr. Justice Mondelet to prevent this Court from admitting the prisoner to bail.

6th. That that order is objectionable as tending to restrain the learned Judge by whom it was made, and all his brother Judges, from the exercise, during vacation, of a power vested in them by law for the protection of the liberty of the subject.

' Considering these points established, and bearing in mind, 1stly, that no instance in mod ern times has been found of any Court in England having refused to accept bail in a case of misdemeanor ; and, secondly, that the prisoner has been tried twice without being found guilty, the conviction has forced itself upon my mind that we cannot consistently with those rules by which we are usually guided in the administration of justice, refuse to admit the prisoner to bail. It is with regret that I have found the Court divided as it is in this case ; but this difference of opinion has been for me an additional reason to examine and weigh with the utmost care the authorities and arguments submitted. I shall add merely that in explaining my views in this

case I have spoken without any reserve of the objections to which, in my opinion, the order of my brother Mondelet is subject. Under any circumstances I think that he would wish me to do so. And I have the less hesitation in doing so in the present instance because whatever doubts may exist as to the other points of the case, there can be none in the mind of any reasonable person as to the motives of that Hon. judge in making the order impugned. He had seen in this case two grave miscarriages of justice, and his object evidently was to prevent the case from ending in a total failure of justice. Moreover, although I express and act upon my own opinion (as I am bound to do, whatever may be my respect for the views of others), I do not fail to bear in mind that, although the order complained of is opposed to the opinion of the majority of the Court, it nevertheless is fully approved of by my brother Aylwin, than whom there is no one more competent to judge of the matter.'

The prisoner, W. W. Blossom, was subsequently admitted to bail at Montreal, according to the terms of the judgment.

Mr. Ramsay conducted the case on behalf of the Crown, and Mr. Devlin for the prisoners.

SUPERIOR COURT—JUDGMENTS.

Montreal, 30 Sept., 1865.

BADGLEY, J.

ELLIOTT *v.* GRENIER *et uxor.*

HELD—*That a wife séparée de biens is liable not only for the groceries used by the family, but (semble) for small sums lent to the husband, and expended by him in marketing for the family. Further, that she is liable for spirituous liquors used in the house for entertaining friends, as well as for wine and porter; but that she is not liable for a sum loaned to her husband, not used by him for subsistence. Held also, that pleas of compensation and prescription are entirely inconsistent with an averment of never indebted.*

The plaintiff in this case was a grocer in Montreal, and carried on business there from 1854 up to the present time. In 1854 he began to supply Mr. Grenier and his family with groceries. This ran on from 1854 to 1859. Then the plaintiff made up his accounts and found a balance of £119 due on the groceries. For this balance he brought an action against Mr. Grenier and his wife. The wife was qualified as being *séparée de biens*, and they were both put into the case on the ground that the groceries were necessary for the subsistence of Mr. Grenier and his wife, and their family. From 1854 to about the end of 1855, they received from plaintiff a large amount of groceries, in value about £200. In the account were several small sums, amounting to only £6 or £7, advances of money made by Mr. Elliott to Mr. Grenier. Madame Grenier now said, I am liable for my groceries, but I have a very great objection to pay this £6 or £7 advanced to my husband. True, replies the plaintiff, but while the account was running in 1855, your husband paid me £45 by a promissory note, and I apply this in payment of the monies advanced, leaving the balance due on the groceries only. This seemed reasonable enough. But beside this, it was in evidence that these small sums were got by Mr. Grenier to purchase things on the market for the support of the family. As these things went into the stomachs of the defendants, the objection must go for nothing. There was an item of £6 or £7 for a great number of small things which during the course of 5 years amounted to that sum, and which the defendants had very industriously collected out of the general account extending over ten or twelve pages. These items, said Madame Grenier, were not got for the family, and therefore, she was not liable. Now the evidence showed that these things, such as a half-pound of cheese, crackers, &c., were got by Mr. Grenier for the subsistence of himself and family, as he called at plaintiff's store for them on his way to town, &c. There was, however, a large item of £65, for brandy, whisky, gin, &c., for which Madame Grenier said she was not liable because she did not drink them. But it appeared that she had obtained a quantity of wine to put into her sauces, which corresponded with the amount charged in the account; that a box of brandy was also brought in from the plaintiff's, and that the remaining whiskey and gin were used in the house for entertaining friends. £65 objected to was a specific objection against spirituous liquors, but included in this was about £8 for a quantity of porter, which article was not objected to under the spirituous liquor denomination, and came under the head of *subsistence*. Besides it was only now at the last moment that all these objections were made. It was proved that Mr. Grenier frequently when passing the plaintiff's shop got a bottle of brandy, which he put into his pocket to take home for the subsistence of himself and family. The remaining part of the account was not objected to. The difficulty seemed to arise out of the credit side of the account. In 1854 Madame Grenier rented to the plaintiff a shop—the shop from which these things were obtained—at £75 a year, and there was an understanding that the rent was to go in payment of the grocery account. In Sept., 1856, before the expiration of two years, she gave the plaintiff a receipt in full for two years' rent (£150), and this money was at once applied in payment of the account. But there was a sum of £50 lent by the plaintiff to Grenier, who handed it over to the firm of Murphy & Grenier, this latter being the defendant's son, and living with them during the running of the account. Clearly, this £50 loaned was not subsistence, and Mad. Grenier could not be compelled to pay this amount. Judgment would, therefore, go for the amount claimed, less this £50; but there would be a reservation in plaintiff's favor against Mr. Grenier for this sum.

The pleadings in the case, it must be remarked, were very irregular and contradictory. There was a general denegation denying that the defendants ever got any of the things, and

after this absolute denial of having ever got anything at all from the plaintiff, or being indebted to him, the defendants pleaded compensation and prescription to and against what they asserted had never had any existence, pleas entirely inconsistent with their previous averments. But there was a third plea setting up all the facts, and it was upon this plea that the case was judged.

O'DONOHUE *v.* MORSON.

HELD—*That the surety for an absent tenant has no right of action for the resiliation of the lease, on the ground that the premises are out of repair; and cannot bring any such action in the name of the absent tenant.*

The plaintiff in this case leased from defendant a house in the St. Ann Suburbs, which was not in very good order. After being there for some time he paid the first quarter's rent without making any objection. Some time after however, he was convicted of having sold liquor without license, and, fearing the result of the judgment he went away to parts unknown. Before he went he had sub-let the front half of the upper flat and part of the second flat, and he left the tenants in the house when he went. When the second quarter was entered upon and one month due, the defendant's agent applied for it, but did not get it. In the original lease another party became surety jointly and severally for the payment of the rent, and having been applied to for the money, he thought it would be a very good plan to institute an action in the name of the absent tenant for the resiliation of the lease upon the ground that the roof leaked. But if the surety had a right of action at all he should have brought the action in his own name; the law gives him as such surety no right to plead the personal inconvenience of the tenant for whom he became surety, even if the tenant had suffered such inconvenience. The tenant never complained that the roof leaked, or that the house was in bad order. He paid his first quarter's rent regularly, and would have paid the month's rent of the second quarter, and probably remained to this day but for the conviction. The action must be dismissed with costs.

Ex parte DANSEREAU *v.* CORPORATION OF VERCHERES.

HELD—*That a procès-verbal made by a superintendent without visiting the localities or examining the previous procès-verbaux connected with the work, will be set aside as not entitled to confidence.*

This was an appeal from a *procès-verbal* for building a bridge. By resolutions of the Council, a superintendent was appointed to go and visit the place with all the authority vested in him by his appointment, and make a report. The Court was not disposed to maintain this *procès-verbal*. The superintendent had not performed his duty, had not visited the localities to be affected by his report, had not examined the *procès-verbaux* connected with the work, and himself declared and reported subsequently that if he had seen the *procès-verbaux* he would have made a different report. This declaration made by the superintendent was sufficient to have his report set aside, because no confidence could be placed in a report made under such circumstances. Appeal maintained, and *procès-verbal* set aside.

NORDHEIMER *v.* FRASER.

HELD—*That a person who has leased a piano belonging to him, has a right to revendicate it after it has been sold by a third party to cover advances made by such third party to the lessee.*

Held, also, that a sale of property pledged for advances must be public and after due advertisement.

The plaintiff leased to one Laidlaw a piano proved to be worth $500, for three months, at $6 a month. In August following Laidlaw applied to Mr. Leeming for an advance upon this piano, telling him it was his. Mr. Leeming without making any inquiry advanced him $200 upon the piano, and afterwards advanced him a further sum of $25, but not upon this piano. Some time afterwards Mr. Leeming's head man of business applied to a manufacturer in town and asked him what he thought the piano was worth. The answer was $200. Now the piano was proved to be worth $500. Mr. Leeming, however, sold the piano to defendant for $200, which was not sufficient to cover the advance and expenses. The question then was, did Mr. Leeming acquire any right of property in the piano by making advances upon it? when Laidlaw went first to Mr. Leeming, the latter proposed to put it under Nordheimer's care, but Laidlaw of course objected to this. Nordheimer had endeavoured to find out where the piano had got to, but it was only just before the action was brought that he found out what had become of the piano. Now as to Mr. Leeming's right to sell this instrument—if sold at all, it should have been sold publicly, and after being properly advertised as the property of Laidlaw. It was only put into Leeming's hands as a pledge, and the public had a right to be notified of the fact. Mr. Leeming not having taken the necessary precautions, cannot deprive Nordheimer of his property. Under these circumstances the *saisie-revendication* must be held good, and judgment given in favor of plaintiff.

MCWILLIAMS *v.* JOSEPH.

HELD—*Where a builder had quarried some stone under a contract, which he afterwards refused to sign, that he was, nevertheless, entitled to be paid for the work done.*

The defendant in this case asked for tenders for building a house, and the plaintiff made a tender. At the bottom of the tender it was mentioned that the work was to be completed within a certain time for a certain sum; and if not completed within the time specified, the sum to be paid was to be less. Defendant told plaintiff to go and sign the contract, but in the meantime he said he might be quarrying stones for the building. The plaintiff began to quarry the stone, but did not sign the contract, and said he would not do so unless he were allowed

to fix his own time. There was, therefore, no contract between the parties. But work had been done by plaintiff, and defendant must pay the value of the stone quarried, less what had been used by plaintiff in building another house. The amount was small. Judgment for plaintiff with costs as of the lowest class, Circuit Court.

McGIBBON *v.* DALTON.

HELD—*That where the rule appointing arbitrators authorizes them to settle the question of costs, the Court will not disturb their award as to the costs.*

An action for work done. The matters in dispute were referred to arbitrators, and in the rule appointing the arbitrators and *amiables compositeurs*, they were specially authorized to decide upon the costs of the case. The action was brought for £56, and the defendant pleaded that he owed only £6; and although the arbitrators awarded plaintiff £20 yet they had left each party to pay his own costs. This would not have been the judgment of the Court, but as the arbitrators had received authority to fix the costs, the parties must abide by the award. Report homologated.

Montreal, 31st October, 1865.

BADGLEY, J.—

LECLAIRE *et al. v.* DAIGLE and RICHARD, opposant, and GIARD, opposant and contesting.

HELD—*That an election of domicile by an opposant at the office of an attorney must state where the office is situated.*

A writ of execution issued out of this Court, addressed to the Sheriff of Arthabaska, for the sale of defendant's property. The property was seized and sold, and the Sheriff made his return of the moneys to this Court. Thereupon a *projet* of distribution was made; oppositions were fyled and among them was one by Giard, and another by Richard. The report of distribution collocated Richard and thereupon Giard contested his oppsition. Richard was resident in Arthabaska, and almost at the last moment his attorney ascertained that a contestation had been fyled here. He now moved that it be rejected for insufficiency of service. Now Richard's opposition did not establish a domicile according to law. It merely elected domicile at the office of his counsel, without stating where this office was. The ordinance required opposants to elect a domicile *à peine de nullité*, but the domicile required by the law was a local habitation, there was none here. The contestant, however, did not take exception to this irregularity, but went into the merits of the opposition; and the contestation, instead of being served on Richard's counsel, was left at the prothonotary's office. The latter, hearing of this almost at the last moment, moved to reject it. The difficulty appeared to have risen from some difference between the attorneys, and as the Court could not allow the rights of parties to be jeopardized by such differences, there would be an express order rejecting the motion without costs, and giving Richard an opportunity of answering the contestation.

STEPHENS *v.* HOPKINS.

HELD—*That the use of the present tense 'has' instead of the past 'had' under the circumstances stated was good ground for a demurrer.*

This case came up on a demurrer. The action was brought to compel the defendant to remove certain boxes, complained of as a nuisance, from the Prince of Wales' lane, through which he claimed to have a common right of property with the defendant. The defendant demurred to plaintiff's action on several grounds. The plaintiff, a considerable time afterwards, instituted his action, and in his declaration alleged that he went into possession of the premises on the 1st of February last, but he only purchased on the 6th. He further alleged that since the 1st Feb. the defendant or his agent erected these boxes, and that "he *has* no right to erect them," using the present tense instead of the past in his declaration. It was not alleged that he had no right to erect the boxes at the time they were erected. This difficulty, though highly technical, made the demurrer a good demurrer, but the plaintiff would be allowed an opportunity to amend his declaration. Demurrer maintained with costs, and action dismissed, unless the plaintiff chooses to amend his declaration.

BEAUQUAIRE *v.* T. DURRELL, and WM. DURRELL *et al.*, opposants.

HELD—*That the Sheriff cannot suspend proceedings upon an opposition to a venditioni exponas without an order from a judge.*

Judgment was obtained against the defendant in 1837. Execution issued in 1857. Two lots of land were seized, one was sold, and the other remained unsold. On the 2nd Feb., 1860, three years after the execution issued, the defendant died. There was no proceeding of record to render the judgment executory against the heirs, but in 1863 the plaintiff obtained a writ of *venditioni exponas* for the sale of the second lot of land. Upon the issue of this *venditioni exponas*, the opposants, heirs of the defendant, came in by opposition and claimed the land as theirs. The opposition being put into the hands of the Sheriff, he undertook to suspend the proceedings, which the law did not allow him to do, there being no order of the judge, directing him to suspend them. An opposition to a *venditioni exponas*, without such an order of the judge, was no opposition at all, and the sheriff was not bound to take any notice of it. The opposition, therefore, on this ground would be dismissed but without costs; but the parties might obtain an order to suspend upon a new opposition: this opposition dismissed.

GOUGH *v.* GREAVES.

Demurrer maintained to declaration setting up a contract, and (without asking that the contract be set aside) claiming more than was stipulated in the contract.

The defendant in this case, a married man had intercourse with the plaintiff, his servant woman; and a female child was born. The

defendant had the woman sent to the Lying-in Hospital. Subsequently, in October, 1862, the induced her to enter into a notarial agreement, in which it was stated that to avoid scandal and litigation, she was to accept $6 per month till the child should attain the age of 7, in consideration of which she was to forego her claim for damages against the defendant. $12 were paid at the time the deed was passed, and $24 were afterwards acknowledged to have been paid, so that six months were paid in all. But subsequently the defendant refused to support the child, and for the past two years and a half he had not paid a cent. The plaintiff now was advised at law that the bargain between them was no longer in force, and she was induced to bring an action claiming $10 a month from the time of the child's birth. As the condition of the agreement was that the plaintiff was to forego her claim for damages on his paying the $6 a month regularly, the bargain respecting damages might be considered at an end. But the bargain for the child was $6 a month up to the age of 7, while the plaintiff claimed $10 per month up to the age of 14. This was met by a demurrer on the part of the defendant, stating that plaintiff cannot go beyond the contract. She ought to have prayed that the contract be set aside. The Court, therefore, could not do otherwise than maintain the demurrer, but the defendant would be allowed no costs, and plaintiff would have an opportunity of putting her action in such shape that a judgment could be rendered.

BERTHELOT, J.,

ROBERTS *v.* WEST.

Capias quashed because name of deponent's informant was not disclosed in the affidavit.

In this case the defendant moved to quash the *capias* on the following among other grounds: That the affidavit set out that the defendant had been in the United States, and was immediately about to return there, but did not state the name of the person who gave this information to deponent. It was alleged that the thing was publicly known, and that defendant had entered his name on the books of a Hotel as being of New York; but this was not sufficient. Judgment would go quashing the *capias*, because the name of the informant was not given.

GOULT *v.* DUPUIS.

HELD.—*That a person ceasing to profess the Roman Catholic religion must notify his curé in writing, in order to be exempted from liability for church dues.*

This was an action for church dues. The plea of the defendant was that he had ceased to be a Roman Catholic, and that being now a Protestant, he was not liable for the amount claimed. To support this plea he desired to adduce verbal evidence. Mr. Justice Monk had rejected this testimonial proof, and a motion was now made to revise this ruling. The court believed the ruling to be correct. A person ceasing to be a Roman Catholic must give his *curé* notice in writing. Verbal proof would be too easily obtained. There being no *commencement de preuve par écrit* in this case, the ruling was correct, and the motion to revise must be rejected.

MONK, A. J.,

RANSON *vs.* CORPORATION OF MONTREAL.

HELD.—*That Counsel may be called upon to disclose the place of residence of their clients; but it is optional with them to answer.*

This was a petitory action. In the declaration the plaintiff was described as of the district of Ottawa. Since the institution of the action he had left his residence, and probably the Province, and was not to be found. The defendants were desirous of serving on him a rule for *faits et articles*, and not being sure that interrogatories served at the Prothonotary's office would, in case of the plaintiff's default, be taken *pro confessis*, they made application that the plaintiff's attorney should be called on to declare where his client was. Their intention was, if the attorney stated where the plaintiff was, to send a commission to examine him. While if his attorney refused to state where he was, they believed they would then be justified in serving the interrogatories at the Prothonotary's office. The plaintiff's attorney answered that he could not be compelled to disclose his client's whereabouts, and that it would derogate from the authority of the Court to give an order which might be disobeyed with impunity. Further, that the plaintiff had been indicted, true bills found against him, and he was a fugitive from justice; so that it would be a violation of professional confidence to state where he was. With reference to the first point, it certainly seemed to be an extreme exercise of authority to order a counsel to state where his client was. But it had been done in France; and, moreover, the counsel was at liberty to refuse to comply if he pleased. His refusal only put the defendants in a more advantageous position. As to the second objection, it was not, in the opinion of the Court, any breach of professional confidence, and, besides, there was no compulsion in the matter. Rule granted.

GLASSFORD *v.* TAYLOR.

HELD.—*That the Superior Court has no power to amend an award of the Board of Revisors of the Montreal Corn Exchange Association. If irregular, it must be set aside in toto.*

This was an action brought upon an award of the Board of Review of the Montreal Corn Exchange Association. This Association had obtained an Act of Incorporation empowering it to provide by By-law for the appointment of arbitrators to whom may be referred controversies relating to commercial matters between the members. From the Arbitrators there was an appeal to the Board of Review, and the award rendered by this Board was deposited in the Superior Court. The Court had no power whatever to touch this award, there being no appeal or *certiorari* allowed. In the present case, the two arbitrators not agreeing a third was named, and subsequently the Board of Revisors gave their award, which was deposited in

course calling on the party, against whom the award was rendered, to show cause why the award should not become a judgment. The defendant met this rule by a contestation. Besides minor objections, it was alleged that he had not received written notice from the Board of Review, as the law required. The Secretary was brought up, and said he believed he had given defendant notice, but he did not find any trace of it, and could not remember whether he had done so. The award was therefore bad upon this ground alone. But there was another objection more fatal than this. The award condemned Taylor Bros. to pay certain freight, but the amount which they were to pay was not mentioned in the award at all. The omission might, probably, be rectified by reference to the proceedings: but the Court had no power to add to or subtract from the award; so that being absolutely null in consequence of this omission, the action must be dismissed with costs.

DRAPEAU *v.* FRASER.

HELD.—*That the sheriff must be made a party to an action to set aside a sheriff's sale.*

The question in this case was whether the Sheriff should be made a party to the suit brought to set aside a sheriff's sale. It was asked by the plaintiff, why bring in the Sheriff? We do not complain of him. Why go to the expense and trouble of including him? There was a good deal of force in this. Upon philosophical grounds it was right; but the Court had to look to the jurisprudence for its guidance. In this case it might be urged that the Sheriff must be brought in, because he executed the writ. He was the man who did the wrong, and a copy of the judgment must be served upon him. The mere fact that the judgment of the Court was to be served upon him, and that this judgment went to set aside an act of his, was sufficient ground. But there was another reason for it. The plaintiff complained of the Sheriff's act; he did not say it was fraudulent; but the Sheriff might have a good deal to say about it. There was another ground beyond this. The Sheriff was an officer of the Court. He was ordered by the Court to do a certain thing, viz., to sell the defendant's property in satisfaction of the debt; and he went and sold, not only the defendant's property, but that of other people. He should be brought before the Court to explain this. Further, it was in accordance with the uniform practice of the Court. Widows of Sheriffs had even been brought in after their husbands had died. A practice so uniform could not be considered a useless practice. Therefore, although the case had been allowed to go *exparte*, the Sheriff must be brought in.

COURT OF REVIEW.—JUDGMENTS.

31st OCTOBER, 1865.

PRESENT.—BADGLEY, J., BERTHELOT, J., and MONK, J.

BRITISH AMERICAN LAND CO. *v.* MUTUAL FIRE INSURANCE CO.

HELD—*That a policy of insurance is vitiated by changes increasing the risk, made in the buildings insured without legal notice to the insurers.*

BADGLEY, J.—This was a case from the Circuit Court of the St. Francis District. The action was founded upon a policy of insurance on certain buildings in Sherbrooke, comprising a manufactory and certain detached buildings near the manufactory. After these buildings had been occupied some time, the proprietor thought proper to make certain changes and additions, and, unfortunately, without giving the required notice to the Company. It was true he did intimate verbally to the Secretary-Treasurer of the Insurance Company in conversation that certain changes were being made in the buildings, but there was no notice according to law. There was nothing to show that the company had ever been made aware of the changes that had taken place. It is a principle of insurance that where changes have been made increasing the risk, and no notice has been given of this increased risk, nor any consent given by the Insurance Company, the insurers are not liable. Unfortunately the fire in this case was found to proceed from the part of the buildings where the changes and additions had been made. There was no doubt, therefore, that the judgment must be reserved and the action dismissed. The original policy had been changed by additional buildings of a more risky character, and these buildings being burned down the Insurance Company could not be held liable upon the policy. Judgment reversed.

MORIN, *fils*, *v.* PALSGRAVE.

HELD—*That in order to bring an action en complainte, the plaintiff should have had actual possession of the property for a year and a day before the institution of his action.*

BADGLEY, J.—This was a case from the District of Richelieu. It was an action *en complainte*, and the legal ground of that action is the actual possession of the plaintiff for a year and a day before the institution of his action. In this case the plaintiff claimed to be in possession of a certain property, but his possession had been interfered with by the defendant, the action not being brought within a year and a day of the *trouble*. The testimony was clear that both the parties had been in possession of the property at different times up to and before the institution of the action. Now the possession should be in the plaintiff alone, and not divided with any one else, otherwise the action *en complainte* could not hold. The parties in this instance had agreed that they would not go upon the land till the case was settled. Under these circumstances the judgment of the court of the District of Richelieu in favor of the plaintiff must be reversed.

WARD *v.* BROWN, and BROWN, opposant.

Deed of donation declared fraudulent, under the circumstances stated.

BADGLEY, J—This was an appeal from a judgment rendered in the District of Iberville. The plaintiff obtained a judgment, on the 10th May, 1863, against the defendant, for a debt due

since 1st August, 1861. The opposition was made by the son of the defendant, and the ground of the opposition was that the defendant had made a donation of the property seized to the opposant, his son, in Feb., 1863, whereby the seized property had become the opposant's. The consideration of this donation was the support of the donor and his family, the right of usufruct in the estate being, moreover, reserved by the donor. In the deed it was declared that $1189 had been paid, and the balance, $500, was said to have been received subsequently. The contestation arose on this deed, which, it was alleged, was made with the fraudulent intent of preventing the plaintiff from enforcing the execution of his judgment; that the defendant had transferred not only his real estate, but the whole of his moveables, to his son. There was nothing to show that the defendant's son had ever paid any money for this property, or that the conveyance was anything else than an artifice to protect the defendant's property from the grasp of his creditors. Under these circumstances, the judgment of the Court at Iberville rejecting the opposition must be maintained; but an alteration would be made in, the grounds of the judgment. The opposition would be dismissed on the ground that the donation and the transaction between father and son were fraudulent, and not merely on the ground that the opposant had not proved the allegations of his opposition, as stated in the original judgment.

SCATCHERD *v.* ALLAN.

HELD.—*That when the delay for inscribing a case for review would expire on a Sunday, it is prolonged till the next juridical day.*

BADGLEY, J.—This case was brought up on a ruling of the Superior Court of this District. The plaintiff now moved to set aside the inscription for review, on the ground that the notice was not sufficient. The law said that the party seeking to have a judgment reviewed must, within eight days from the date of the judgment complained of, make the required deposit, and inscribe the case. In this instance the judgment was rendered on the 30th September, and on the 9th Oct. notice of inscription for review was served by defendant's attorney on plaintiff's attorney. On the same day the inscription was fyled in the regular manner, with the deposit. Now the eighth day after judgment rendered was a Sunday, and it was in accordance with the rules of practice that when a delay expires on a Sunday it goes over to the next juridical day. The inscription, therefore, was in time, and the motion must be rejected with costs.

JOHNSON *et al. v.* KELLY.—

HELD—*That in insolvency cases the procedure under the ordinance of* 1667, *requiring the Sheriff to make a procès-verbal to accompany his report, has been superseded by the special procedure introduced by the Insolvent Act of* 1864.

BADGLEY, J.—This was an insolvency case from the Court at Richelieu. It was a case of compulsory liquidation, commenced in the usual manner according to the statute. A writ of attachment was issued from the court addressed to the Sheriff of that district, who acted upon it, and made his return on the return day of the writ. On that day the official assignee in whose hands the Sheriff had placed the estate of the insolvent, applied to the court for a prolongation of the time, in order to enable him to complete his inventory of the estate and effects of the defendant. The return day was the 6th. The official assignee renewed his application for delay, stating the time within which he would be able to complete his report. The court below did not come to any decision upon the application, but it had come to a final judgment on a technical point based on the procedure under the ordinance of 1667. The objection made by the defendant was that because the Sheriff had not returned a *procès-verbal* under the ordinance of 1667, of his doings under the writ, the writ was bad, and must be set aside. But the procedure under the old law had been superseded by the special procedure introduced by the Insolvent Act. The case being one of compulsory liquidation, it was necessary that there should be an act of bankruptcy, and, accordingly, certain allegations were fyled by plaintiffs, supported by affidavit, that an act of bankruptcy had actually taken place. The insolvent did not take any of the proceedings pointed out for setting aside the act of insolvency, and, therefore, the act of bankruptcy stood good on the record. The official assignee had applied for an enlargement of the delay for making his inventory, and it was quite competent for the Court to have extended the time to do so. The defendant then, by *exception à la forme*, objected to the report of the sheriff, because it was not accompanied by a *procès-verbal* of his doings under the writ, which was followed the next day by a petition of the insolvent to the same effect for the same reason; but, as before observed, the statute required nothing of the kind from him. It is said that the Sheriff should return with the writ, a report under oath of his action thereon, but it said nothing more. The Sheriff was not to make the inventory; this was the duty of the assignee. The case went on; proof was adduced confirming the act of bankruptcy, and the defendant pleaded by *exception à la forme* exactly the same as if he were pleading in a civil action. Now there was no such course of pleading provided by the act, which had substituted a different procedure. The mode there provided was by summary petition, which the defendant had also followed. Finally, the Court at Richelieu had rendered a judgment quashing the writ of attachment on the ground that the return of the Sheriff was not accompanied by a *procès-verbal* under the old system. The Court was wrong in departing from the statutory procedure, and the judgment could not be maintained.

MONK, J., did not go to the extent of saying that a *procès-verbal* was unnecessary under the insolvent law. He believed it necessary for the Sheriff to tell the Court precisely what he had done. But in this case he considered that

there was a sufficient return by the Sheriff, and, therefore, he concurred in the judgment.—Judgment reversed.

Snowdon & Gairdner for plaintiffs.

SUPERIOR COURT.

30th November, 1865.

Badgley, J.,

MIGNAULT *v.* BONAR.

HELD—*That the celebration by a clergyman of the marriage of a minor without consent of parents, is illegal, and gives ground for an action of damages against the clergyman.*

The plaintiff in this case had been living in the State of New York with his family, but returned to this country a year or two ago and lived in Montreal. His daughter, aged eighteen, who was perfectly well acquainted with the English language, kept company with a man who one day induced her to accompany him for a sleigh drive. To preserve appearances the lady took her younger brother with her in the sleigh, but the man afterwards sent the boy off to the post office, and took the girl to the Rev. Mr. Bonar's private residence, and there, in the presence of two persons, sent there for the purpose, a marriage took place, a license being presented by the husband. The name given to the clergyman was not her real name. It was not quite clear that she did not herself sign the register. She said she did not sign it, and she said also that she never had any idea of marrying this man, but that when she got to the Rev. Mr. Bonar's house she was called to stand before the clergyman; that she never made any objection; Rev. Mr. Bonar read something out of a book, which she must have comprehended, as she was familiar with the English language read to her, and after it was all over she was told that she was married. As soon as the marriage ceremony was over, her husband took her back to her father's house. The ceremony was all that took place, there not being any consummation of marriage. Now this girl was by law a minor, and her father had never given any consent to the marriage, and, unfortunately for the clergyman, it was true that he asked no questions about her age, or whether there was any consent. The father now brought an action of damages against the clergyman. This was not the first case of the kind that had come before our Courts. There was the case of Larocque *v.* Michon (2 L. C. Jurist, 267) which entailed very heavy consequences on a Catholic priest who married a minor of fifteen, without the consent of her parents. The judgment of the Superior Court in that case dismissed the action, on the ground that the marriage of a minor without the consent of her parents did not give rise to an action of damages until proceedings were had to set aside the marriage. The Court of Appeals over-ruled this decision: and held that the clergyman had brought himself within the law, although the marriage had not been set aside. In that case, too, there was a dispensation from the Bishop to do away with the necessity of banns, and this dispensation was taken by the priest in good faith. Nevertheless, the Court of Appeals condemned the priest to pay £100 and costs, and it was only in consideration of his being a poor man, a mere missionary, that they made the amount so small. This Court was bound by the judgment in appeal, and the defendant must be condemned to pay damages. There were circumstances, however, which would mitigate the amount. In the other case the girl was only fifteen, and must have been perceived to be a minor; and she was personally known to the priest. In this case the female was a well formed woman, and at the time of the marriage she knew all that was going on, and it was only after the marriage that she said she was living with her father and that she was only 18. The ceremony had then been performed; but this was only the civil contract of marriage, not being a Sacrament in the Protestant Church, and the girl had suffered nothing, as there had been no consummation of marriage. The defendant could not escape damages, but, taking all the circumstances into consideration, the Court was not disposed to go so far in this case as the Court of Appeals had gone in the other, and the defendant would merely be adjudged to pay $100 damages, with full costs.

Ex parte HERMINE DENIS.

HELD—*That entries in the registers of Births, Marriages, and Deaths may be amended by order of the Court on application and due proof.*

This was a case of an Italian who died in Montreal. In the entries of his marriage, of his children's birth, and of his own death, his name was spelt differently. There was now an application to the Court to have the name corrected on the Registers, because he was entitled to certain properties in Italy, and the erroneous spelling might lead to difficulties there. As the facts had been proved, the application would be granted.

MAY *v.* LARUE.

HELD—*That an insolvent who has allowed the delay of five days prescribed by the Insolvent Act of* 1864, *to elapse, without presenting a petition, will not be permitted to appear afterwards.*

This was an application made on the part of the defendant to be permitted to fyle an appearance in the case. An attachment had issued against the defendant's estate under the Insolvent Act. But the Statute said that the party contesting shall present his petition "within five days from the return day of the writ, but not afterwards." The defendant merely moved to be permitted to fyle an appearance. The time had gone by. With the law so positive, it was impossible to grant this motion. Motion rejected.

BENNING *v.* CANADIAN INDIA RUBBER CO. and HIBBARD INTERVENING.

HELD—*That a residence of a year and a day is not required in order to acquire a domicile.*

The plaintiff moved for security for costs from the intervening party on the ground that he

had no domicile here. The rule as to acquiring domicile by a residence of a year and a day did not apply here. It was in evidence that the intervening party had taken up his residence here and was furnishing his house. The application must be rejected.

BELANGER *v.* GRAVEL.

$100 *damages awarded for assault on a justice of the peace in a Magistrate's Court.*

This was an action of damages brought by plaintiff, a colonel in the militia, a commissioner of small causes and a Justice of the Peace. It appeared that in the case before magistrates, the plaintiff was acting as attorney for a defendant in the case, when the present defendant came up and abused him, charged him with giving wrong judgments, with appropriating to himself the money of the Fabrique, and raised his hand to strike him, at the same time asking him to go out with him and fight. This abusive conduct was wholly unjustified, and, moreover, took place in the presence of a Court held by Justices of the Peace. The defendant must be condemned to pay $100 damages and costs.

HIBBARD *v.* BARSALOU.

HELD—*That a person proving himself to have an interest in the affairs of a Company is entitled to a mandamus to compel the directors to allow him to have communication of the books.*

In this case an application had been made for a writ of mandamus, for the purpose of compelling the directors of the Canadian Rubber Company to allow plaintiff communication of the books of the Company. The application was made to Mr. Justice Berthelot, and he ordered the writ to issue, returnable on the 19th of the following month. He, Mr. Justice Badgley, saw nothing to prevent a judge from ordering, in vacation, a writ to be returned in term, or from ordering in term a writ to be proceeded with in vacation. The Statute said application might be made to the Superior Court, or to a judge of the court in vacation. The case went on, and was met by a motion to quash, by a declinatory exception, and by an exception *à la forme*. Our Statute laid down a particular form of proceeding for mandamus. In England a very circuitous procedure was followed, but our Statute had set aside all that. It was declared that when the writ issued, it should not be quashed otherwise than by pleading. The motion to quash must therefore be discharged. With respect to the declinatory exception, there was nothing to decline, and this exception must therefore be rejected. There remained the exception *à la forme*, which embraced all that was urged under the other proceedings, with reference to the right to issue the writ itself. It was true that in England the Courts had avoided issuing writs of *mandamus*, where public interests were not involved. But our statute had made the *mandamus* a part of our law. It was not, as in England, a thing governed by the Common Law only. The statute pointed out a particular mode of proceeding and gave remedies. The writ was issued by the Judge on petition, or *requête libellée*, supported by affidavit. It was like an ordinary writ of summons, calling upon the party to come in and answer it. The party on whom it was served could only answer it by pleading. In this case, then, the first point was whether the plaintiff had such an interest as to justify him in having access to the books of the Company, as he asks in his petition. His Honor thought he had. His rights in the Company had been bought out for $50,000, he was no longer to be president, and he was not to be permitted to establish a rival institution in the colony within three years. During that time he was to receive 10 per cent., or $5000 per annum on his capital, and then further arrangements were to be made. For carrying out these arrangements, the plaintiff placed his shares in the hands of Mr. Barsalou individually as a security for the contract that was entered into. But he did not divest himself of his stock in the institution. Had the plaintiff not an interest in this institution if he remained in the same position now as then? His interest could not be denied. He had set up specific grounds for desiring to look not into all the transactions of the Company, but into the transactions between Messrs. Benning and Barsalou and the Company. At first he had been promised permission, and then he had been refused. This looked as though there was something suspicious to be covered up. The plaintiff having reasonable grounds for complaint was entitled to his *mandamus*. Proof had been made on the exception, which was insufficient, and it would be dismissed.

COLUMBIAN INSURANCE CO. *v.* HENDERSON.

HELD—*That a corporation must give security for costs in cases where the law compels a private individual to give such security.*

In this case a motion was made on the part of the defendant for security for costs. A Corporation could not be exempted from giving security any more than a private individual. The motion must, therefore, be granted.

STEPHEN *v.* STEPHEN.

HELD—*That the proper mode of proceeding to destitute a tutor is by petition.*

This was a petition *en destitution de tutelle*. Various allegations had been made for the purpose of having the tutor destituted. He was said to be insolvent, living upon his minors, taking them to Indiana, exposing them to disease, when for their health they should have been taken to the seaside. All these circumstances, together with others alleged, *prima facie* were sufficient to shew that he was not a fit person to be tutor. But the latter demurred on the ground that the proceeding should have been an action at law. Five and twenty records of petitions in similar cases had been sent up, which constituted a sufficient jurisprudence on the subject; but, beyond this, it was only necessary to look to the words of the Statute which spoke of annulling the appointment of a tutor upon petition. The demurrer, therefore, must be dismissed with costs.

CLEMENT *et al. v.* LEDUC.

HELD—*That where two wills, exact copies of each other, and made at the same time, by husband and wife, contain the same legacy, the legacy is only payable once.*

This was an action for certain legacies. Old Gilbert Leduc and his wife were married at the end of the last century, and lived together *communs en biens*. Having attained the age of 70, they died within a few months of each other. They had a numerous family, and as the children grew up and married, the old people purchased properties for them or gave them money, and established them in life. In 1841, the old couple thought it better to settle their estate, and they called in Brault, a notary, who made a will for each of them. But these two wills were exactly the same; they contained the same charges, the same conditions, the same usufruct; and were made at the same time and with the same object. In these wills the old people specifically referred to what they had done for their children, then it was stated in each that the testator gave to two of his grand-daughters 3'000 livres and afterwards made the defendants, their grand-sons, the universal residuary legatees of each testator. After the death of the old man, an inventory was made of his estate, and it was shewn that the property of the community was so charged with debt that it was of little value. Several years passed after this without anything being done by the plaintiffs, the special legatees, except that they had received from the universal residuary legatees their 3,000 livres, as appeared by receipt given by the sisters to the brothers. The grand-daughters now claimed 6,000 livres more, 3,000 under each will. The only question then was this, were these two wills, made at the same time and containing exactly the same words of bequest, to be considered in the nature of a *don mutuel*, or were they to be considered two wills, giving 6,000 livres to each of the grand-daughters, *i. e.*, 3,000 from each of the grand-parents. It was shewn that this would give the grand-daughters twice as much as the daughters had received. Now the law was this with respect to legacies:—If there were several legacies by the same will, payable to the same person for the same sum, the legacy would be only payable once, unless the legatee proved that the testator intended to make several legacies. But if the legacies were made by different instruments, the sum would be due under each instrument, subject, however, to proof of actual intention. The plea in this case was that the wills were joint wills, and, therefore, there was only one sum due. The wills were exact copies of each other, not made by strangers but by husband and wife, and the only difference seemed to be that the notary preferred to make two wills instead of one. Therefore the Court considered them as a *testament mutuel* upon which only one legacy was due. But the authorities laid down that these inferences might be controverted or established by testimony. Now, in this case, there was the evidence of a woman who was a relation of the parties, and she stated that before the wills were made, the old woman told her they were going to give their grand-daughters 1,500 livres from the two grand-parents together, but on the representations of witness, they increased the joint legacies to 3,000 livres, and after the wills were made both testators declared the same thing. This testimony was good under the French law, and, therefore, the action would be dismissed.

MCFARLANE *v.* LYNCH, & RAPIN *et al.* petitioners.

HELD—*That the sureties of a debtor, who has been ordered to be imprisoned for not fyling a statement, are not discharged till the debtor has been delivered into the hands of the Sheriff under the original writ of capias ad respondendum.*

The plaintiff having obtained a judgment against Lynch, the usual proceedings were taken to make him fyie a statement; and on his default to comply, the plaintiff took proceedings to have him incarcerated for punishment under the Statute, and he was therefore ordered by the Court to be imprisoned for six months as a punishment. The Sheriff could not find the defendant; but at a subsequent period one of the sureties petitioned the Court for the issue of a *contrainte par corps* against the defendant, who, he said, could now be found, and he was, in consequence, arrested and imprisoned for six months as a punishment. The sureties now said they had done everything the law required, and prayed to be released from the bail bond because the defendant was in jail. But the Court did not consider that the imprisonment of the defendant as a punishment had the effect of discharging the sureties. He had not been delivered into the hands of the sheriff under the original writ of *capias ad respondendum*. Under these circumstances, the petition in this and two other cases must be rejected with costs.

In re FERON, insolvent.

HELD—*That the wife of an insolvent cannot be examined as a witness by the assignee respecting her husband's affairs.*

In the case of this insolvent the assignee petitioned for the examination of the insolvent's wife under the Act, when it was objected that she could not be examined, there being no law which authorized the examination of a wife respecting her husband's affairs. The case was submitted upon the deposition. It was the opinion of the court that she could not be examined. The clause giving authority to examine "persons" respecting the estate of the insolvent, was copied from 6 Geo. 4, but in the English Act special authority was given to the commissioner to examine the wife. In this country, strange to say, a similar clause was in the bill, but it was struck out in committee and formed no part of the act as it now existed. There was a reason for this. Public policy did not allow domestic incidents to be brought before a court of justice. The ordinary statute law said specially that the wife shall not be a witness for or against her husband. Looking, therefore, at the policy of the law and the fact

of the special clause having been struck out, the Court could not grant the application.—Objection maintained.

DRUMMOND *v.* COMTE *et al.*—(In Chambers.)

HELD—*That a writ of prohibition cannot issue to commissioners appointed by the Corporation for the expropriation of property, at least before their report has come before the Court for adjudication thereon.*

On the 19th of January an application was made to a Judge in Chambers for a writ of prohibition addressed to Mr. B. Comte and other commissioners appointed for the expropriation of property by the Corporation. The writ was allowed to issue, and the case now came up on a demurrer, on the ground that a writ of prohibition could not issue at all to these commissioners who were only *experts*. In England, the writ of prohibition was of a peculiar nature. It was a writ issued out of the Superior Court to inferior Courts, and to them only. It issued out of the Queen's Bench to the Ecclesiastical Courts and other inferior Courts. It was a writ prohibiting these Courts from proceeding. (Bacon's Abridgment, word prohibition.) The Act 16th and 17th Victoria was passed in England for the purpose of reforming the practice in cases of prohibition, and the necessity of coupling the Crown with these writs was done away with. Bacon laid down that no man was entitled to a writ of prohibition unless he was in danger under some suit pending. Now there was no suit here, but for the purpose of ascertaining the value of property the Corporation were obliged to go before a judge of the court and have commissioners appointed. When the report of the commissioners came before the judge, and he was compelled by law to adjudge upon that report, then would be the proper time to use the writ of prohibition. Looking at the case in this way, the Court was of opinion at the present stage of the proceedings that the demurrer must be maintained and the writ quashed. The same judgment applied to two other cases.

COURT OF REVIEW—JUDGMENTS.

24th November, 1865.

PRESENT: Badgley, J., Berthelot, J., and Monk, J.

CORPORATION OF MONTREAL, *v.* RANSON.

HELD—*That a defendant who has been regularly foreclosed will not be allowed to come in and plead, when the plea offered is not considered good.*

BADGLEY, J.—In this case, argued yesterday, we think the parties should have a judgment without delay. The defendant has asked for the revision of an interlocutory judgment by Mr. Justice Monk, rejecting his motion that default be taken off and that he be allowed to plead. The action was brought for the sum of $500 on a lease. The defendant having left his domicile and the province, the usual advertisement was published during two months. Then the defendant appeared by counsel. The vacation of July and August followed. In September the defendant was notified to plead, and was foreclosed in the regular manner. Altogether a delay of six months has elapsed since the return of the action. The defendant, after default had been entered, applied to the Court for permission to plead. The plea offered is to the effect that the Corporation have obtained possession of certain notes in favor of defendant to the amount of $1300, and that they have collected the amount of these notes. I think this is a good plea of compensation to the action, being for monies alleged to have been actually received upon promissory notes, his property; surely it is clear enough, and I think, therefore, that the defendant should have an opportunity of going to proof. The application of the defendant is supported by an affidavit of his counsel that it was through the negligence of the latter that defendant was foreclosed. But it is evident there was no surprise in this case. The notices were made in regular form. Under these circumstances the negligence almost amounts to a fault. But I have always been reluctant to allow a party to be injured through the negligence of his attorney, and, therefore, I am of opinion that defendant should be allowed to plead, but only on payment of full costs. It is a question of costs. Otherwise he would be obliged to bring a direct action against the Corporation for the amount of cash received on the notes. My colleagues, however, differ from me, and the judgment will, therefore, be confirmed.

BERTHELOT, J.—I concur with the President of the Court in thinking that a party should not be exposed to injury through the neglect of his counsel. But the plea offered in this case is not, in my opinion, a good plea of compensation. The action is for rent, and I do not think that the allegations of the defendant's plea show the existence of a debt *claire et liquide*, which can be offered in compensation. The defendant's proper course would rather seem to be to bring an action *en revendication* of the notes, or an action *en reddition de compte*.

MONK, J.—If the defendant's plea had seemed to me a good one, I would have been disposed to afford him the relief prayed for. But on looking into it, I was of opinion that it was not one that could be maintained. The motion was therefore rejected by me in the Court below.

Judgment confirmed.

Nov. 30, 1865.

ROWAND *v.* HOPKINS, *ès qualité*.

Judgment ordering an account to be rendered confirmed.

BADGLEY, J.—This was an action brought against the executor of the estate of Mr. Rowand, deceased, who was a factor of the Hudson Bay Co. There was a question as to whether the plaintiff was entitled to one-third or to one-sixth of the estates claimed, but the judgment of the Superior Court simply ordered the defendant to render an account, because the plaintiff was entitled to an account whether his share was one-sixth or one-third. Now, there was an application for revision. But there was nothing to review in this judgment, and it must be confirmed.

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A PUBLIC LIBRARIES ACT.

Notice has been given of an intention to apply to Parliament for an Act, under which a free Public Library may be established in this city. The subject was brought before the public some months ago, in a lecture delivered at the Rooms of the Natural History Society, by Mr. F. W. Torrance, and has since been agitated by a portion of the daily press. The proposed Bill will probably be based on the Public Libraries Act of Great Britain and American legislation on the same subject. Divided as the community is in religious creed, it has been deemed advisable to restrict the present application to the non-Catholic section, and the main object of the Act is, we understand, to authorize the non-Catholic portion of our citizens to impose a trifling rate on themselves for the support of the Library; leaving their fellow-citizens of the Catholic faith at liberty to establish a similar Library for themselves, to be sustained in the same way, if they should think proper to do so. It is, doubtless, matter for regret that any partition wall should be built up between the books provided for the use of one and the other section; but, at the present time, it seems the easiest way to avoid difficulties which would otherwise have to be encountered; and, fortunately, the city is wealthy and populous enough to bear without inconvenience the cost of two libraries. Pending the discussion which will probably take place on this Bill in Parliament, and the objections which will doubtless be raised, it may be instructive to glance at what has been done towards the establishment of Public Libraries elsewhere.

Reverting to ancient times, we need hardly remind the reader of the existence of vast libraries of costly parchments, when printing was unknown, and books were multiplied only by the laborious art of the penman. What lover of ancient lore has not sorrowed over the destruction by Omar of the noble collection of parchments at Alexandria, a library which fed the baths of that city with precious fuel for six months! In modern times, circulating libraries have been in use for more than a century, the most stupendous being that of Mudie, in London, which is said to buy over 200,000 volumes every year, and to take from 50 to 200 copies of every new work.

But it was not till 1850, that the first Public Libraries Act was passed in England. By this Act, we believe, it was necessary that a majority of the burgesses should poll their votes in favour of the introduction of the measure, before it could be enforced,—somewhat like Mr. Dunkin's Temperance Act in this Province. The rate to be levied was not to exceed a halfpenny in the £; and, rather strange to say, the Corporation were not empowered to expend any of the money so levied in the purchase of books, but solely in procuring and keeping up the necessary buildings for the reception of the Library.

Manchester was the first of the great English towns to avail herself of the Act. She already possessed a free Library, the funds for which had been raised by voluntary subscriptions and donations, but she gladly availed herself of the permission to levy a rate, granted by the Act, as the firmest and surest basis for the permanent support of her Library. There were croakers in Manchester when the project was first started, yet only forty votes were polled in that great city against the introduction of the Libraries Act, while four thousand were cast in the affirmative! It is a significant fact that voluntary contributions to the Library were received from 22,000 of the operatives of Manchester,—"the metropolis of that Ti-" tanic industry, on the continued success of " which England has deliberately pledged " her station and authority among the na-" tions of the world." The inauguration of the Manchester Free Public Library took place in September, 1852, and at the public meetings held on that occasion the people of Manchester were applauded for the noble example they had set, by Thackeray, Dickens, Bulwer, Charles Knight, R. Monckton

Milnes, Sir James Stephen, and others eminent in English literature.

In 1855 the Act of 1850 was repealed, and a new Act passed, by which several changes were made, in the mode of introducing the law into towns and cities. By section 4 of the new Act, the mayor of any municipal borough, the population of which exceeds 5,000, shall, on the request of the Town Council, convene a public meeting of the burgesses. Ten days' notice of the time, place and object of the meeting must be given at church doors, and by advertisement. If two-thirds of the persons at the meeting determine that this Act ought to be adopted, the same shall take effect. By sec. 15 the rate levied is not to exceed one penny in the £; and section 23 enacts that if any meeting determine against the adoption of the Act, no other meeting for the same purpose shall be held for at least a year.

Other great cities followed the example of Manchester, and now Public Libraries and Museums flourish in twenty-five English towns, and are the daily resort of thousands who there seek "to satiate that inextin-"guishable craving of the soul of man for "exact knowledge, for abstract truth, and "for comprehensive principles." Doubtless, as Sir James Stephen observed at Manchester, "Such collections are not without their "inconveniences. It may be admitted that "they tend to a desultory, discursive, and "idle use of books. But which is that of all "the blessings we possess of which some "similar abuse is not possible?" Besides, it must be remembered that many who begin with the lighter description of literature, are gradually drawn on to graver studies, in history, political economy, or science.

The people of the United States have been noted for the ample provision made for the education of the young, and this preliminary training has been wisely followed up by the establishment of free libraries in several cities, thus throwing open to all classes what, in the words of Bulwer, "are the school-rooms "of grown up men." The noblest public library in the world is that of Boston. The edifice containing it was completed eight years ago, at a cost of $360,000. On the first August last, according to a statement in Mr. Torrance's lecture, "it contained 123,016 "volumes, and 32,558 pamphlets. During "the previous year, it had circulated over "197,000 volumes, or an average of over 707 "per day. There were used for consul-"tation in the building in the same time "13,090 volumes, and during the same pe-"riod 290,950 visits were made to it for the "purpose of reading in its halls, or of taking "out or consulting the books to be found on "its shelves." This Library, though also receiving aid from the City Treasury, has been chiefly built up by the princely donations of which it has been the recipient. Mr. Joshua Bates, of the Barings firm, London, alone contributed the sum of $100,000; Mr. Jonathan Phillips gave $20,000; the Hon. A. Lawrence, $10,000; and Theodore Parker bequeathed to it his own noble collection, comprising 17,000 volumes. The main object sought is to provide useful and entertaining books, which may be taken out and read in the homes of the citizens. There is also a Library of Reference in an Upper Hall. In 1861 it was ascertained that 23 per cent. of the books in the Lower Hall were English novels, which was believed to be a fair proportion of light literature for the popular demand.

It is not necessary in this Journal to enter at length into the advantages derived from a Public Library. They have been set forth in words of glowing eloquence by Dickens, by Thackeray, by Bulwer, the men who have delighted and instructed millions of the present generation from their infancy. The reader will find the subject ably treated in the lecture of Mr. Torrance, to which we have before referred. One reflection, however, occurs to us as of special force in a young, and, comparatively speaking, poor country. How can we, in this colony, hope to have a creditable literature of our own, or to make an important advance in any department of learning or science, while those amongst us whose minds are enkindled by the fire of genius are debarred from access to any considerable collection of books, and are thus unable to follow out the studies begun, or

to ascertain what has been written or achieved by their predecessors in the department they may have selected? Is it not to be feared that many such, chilled and disappointed in their aspirations, are left to brood in solitary hopelessness, till they abandon their designs, or pass from the stage of life, without having accomplished aught worthy of their genius and industry?

It may be said that the proposition to levy a new tax is an objectionable feature in the scheme, and, indeed, we should be glad to see this part of the project altered, if it could be shown that any other course was feasible. But, it must be observed, the proposed rate would probably not exceed half a cent in the £, in other words, a person paying a rental of £50, would have to contribute only 25 cents per annum to the Library Fund; in return for which he would have free access to many thousands of volumes, and be permitted to take them to his home for the perusal of himself and his family. Nor is it proposed to rely solely upon taxation. The voluntary system will also come into play; for while it is considered by the promoters of the scheme, that there can be no other basis so secure as a small rate, for the permanent support, and to defray the annual expenses of the Library, yet it is expected that funds for the erection of an edifice worthy of the position which Montreal assumes as the leading city of British North America will be provided by individual liberality. It is, moreover, urged that the taxation scheme is not a new or untried course, but one which has been found to work well in other countries.

We have some confidence that this scheme will not be nipped in the bud. Some there are whose faces are set with dogged and unreasoning determination against any improvement, be it what it may. From such, opposition may be expected. But we believe that the majority, convinced that the establishment of a free Lending Library and Library of Reference [after the model of the Public Libraries of Manchester, Boston and other cities that have taken the lead in the movement] must effect important good to the community, will hail the proposal with satisfaction, and will further the measures which may be adopted for the speedy accomplishment of this object.

DISAGREEMENT OF JURIES.

It may be remembered that in the course of the argument in the case of Blossom and others, the point was raised by the prisoners' counsel, though not seriously urged, whether a second trial, after the disagreement and discharge of the first Jury, was legal on the ground that no one can be twice put in jeopardy for the same offence. The case of Charlotte Winsor, and some remarks in the London *Solicitors' Journal*, were referred to. The woman, Charlotte Winsor, had murdered a child. At the first trial the jury did not agree, and were discharged, but she was convicted by a second jury. After her conviction, her counsel contended that the verdict was illegal, for two reasons: first, because the Judge had no right to discharge a Jury, at all events, in a capital case; and, secondly, because no person can be twice put in peril for the same offence. The judge appears to have had some hesitation on the subject, and the question afterwards came up before the Court of Queen's Bench. Here the case was fully examined by the Court, and the judges were unanimously of opinion that the verdict was a good one, and ordered the execution of the sentence.

No importance, apparently, was attached to a point which was also urged in the Blossom case, namely, that a failure to agree by one or two Juries raises any presumption of the prisoner's innocence, which requires to be noticed by the Court or Jury at a subsequent trial; and they held that the doctrine that a man must not be twice put in peril for the same offence applies only to a trial which leads to some result. If the man were acquitted, he could not be tried a second time. But if he were neither acquitted nor convicted, he was just where he was before the trial began.

As to the time during which a Jury that cannot agree should be detained, it will be noticed from the remarks cited below, that the Lord Chief Justice was inclined to doubt

the legality of supplying the Jury with refreshments. If it were illegal to do this, of course, the Jury could not be detained more than six or seven hours; otherwise the verdict would have the appearance of being obtained by compulsion. "Our ancestors," observed his Lordship, "insisted upon unanimity in the jury, and were not scrupulous as to the means by which they secured it. It was a mere contest between the strong and the weak—who could best sustain hunger and thirst, and the miseries incidental to such circumstances. It was said to be competent for the judges to lug the jury about in carts. I doubt whether such a thing was ever done. But, assuming it to have been so, we now look upon trial by jury in a very different light. We do not desire that unanimity amongst the jury should be the result of anything except unanimity of conviction. I hold it to be of the essence of the juror's duty that, if he has formed a deeply-seated conviction, he is not to give it up, although the majority may be against him, from any desire to purchase freedom from restraint. That being so, when a reasonable time has elapsed, and the judge is convinced that unanimity can only be attained from the sacrifice of conscientious conviction, why is he to subject them to the torture and misery, men, shut up without food or drink for a long time must endure, in order that the minority may purchase ease by the sacrifice of conscience? The judge was placed in a position of very great difficulty and embarrassment, in consequence of the Sunday intervening. Then arises the startling difficulty that, whereas it would be absolutely inhuman to keep the jury locked up without meat or drink until Monday, the only alternative would be to give them refreshment, and there is no satisfactory authority for saying—the authorities seem rather to be the other way—that after a jury have retired to consider their verdict, you can give them meat and drink."

A bill has recently been introduced in the Imperial Parliament to make it legal to supply a Jury with refreshments; and also to take a verdict on Sunday.

THE TRIAL OF GOVERNOR WALL.

At the present time, when we have been daily reading about the atrocities committed in Jamaica, in suppressing the mutiny there, it may be interesting to revert to a very remarkable case of signal punishment, inflicted on an officer of high rank, who had not committed a tithe of the cruelties laid to the charge of Provost Marshal Ramsay. We refer to the case of Governor Wall, who was tried by a special commission directed to the Chief Baron Macdonald, Judges Rook and Lawrence, and the Recorder at the Old Bailey, Jan. 20, 1802. We are indebted to the *Annual Register* of that year for the particulars.

The prisoner (some time Lieut.-Gov. of Goree) was charged with the wilful murder of Benj. Armstrong, a serjeant in the African corps, by ordering him to receive 800 lashes, which were inflicted by several black slaves with such cruelty as to occasion his death.

The first witness, (says the *Annual Register*) was Evan Lewis who stated that in July, 1782, he was serving at Goree, where the prisoner was then governor, but which situation, it was understood, he was to quit on the 11th of that month. On the 10th he, the witness, was orderly serjeant, and as such attended upon the governor. Before eleven o'clock in the morning he observed between twenty and thirty of the African corps collected together, but could not undertake to say whether the deceased was amongst them, and he understood they were applying to Ensign Deerham, who was the commissary, for a settlement for short allowance. About twelve he saw them again coming towards the government house, of which he informed the governor, who went out and met them at some little distance from the railing before the court-yard; Armstrong was first, and the rest following in a line. The governor called out to Armstrong, and bid him go back to the barracks, or they should be punished. This order they immediately obeyed, without making any noise; on this second time they were not in their uniforms, had no arms with them, nor did the witness hear them make use of any disrespectful language. At the governor's dinner hour the bell rang, and

several of the officers came, and he observed they went away sooner than usual. Soon after, the governor came out and passed the main-guard, who saluted him, and went up to the barracks, the witness attending him at some distance, as it was his duty; from the barracks the governor ran hastily down and began beating one of the men, who appeared to be in liquor, and taking the bayonet from the sentry, beat him with that also, and then had them both confined. At an earlier hour than was usual for them to attend the parade, the governor gave him directions to have the long roll beat, and to order the men to attend without arms. This order they obeyed, and were then commanded to form into a circle, in the centre of which were the governor, Captain Lacey, Lieutenant Paul, Ensign O'Shallaghan, and another officer. There were in all about 300 men; they formed two deep, the witness being outside the circle, but yet so situated as to plainly see all and hear much of what passed. In a short time the carriage of a six-pounder was brought into the circle, and then he heard the governor called Benjamin Armstrong out of the ranks; Armstrong obeyed, when he was directly ordered to strip, tied to the gun carriage, and flogged by five or six blacks, with a kind of rope; he never saw a man punished with such a thing before, nor ever by blacks. The governor stood by, urging them, through the medium of their linguist, to do their duty, and he distinctly heard him say, "Lay on, you black b——, or I'll lay on you; cut him to the heart; cut his liver out." During the punishment, Armstrong said something which the witness did not rightly hear, but he believed it was begging for mercy; and when it was over he was led to the hospital, where he understood him to have died a few days after. This witness saw nothing like a court-martial held; the officers in the centre of the circle, it was true, conversed a minute or two, then turned to the governor, who ordered Armstrong out in the manner he had before stated. He declared that he saw no appearance of a mutiny; that he heard them talking of going to the commissary to require a settlement of their short allowance (upon which they had been for some time), as he and the governor were to leave the island the next morning, and which in fact they did. This witness underwent a very long cross examination, but he did not vary in the material points. He admitted that he heard Armstrong tell the governor that they wanted to settle with the commissary; but denied hearing him make use of any such expression as "I'll be d——d if you shall stir from the island until the stoppages are paid." It could not have passed without his hearing.

Robert Moore, a private in the garrison, confirmed the greater part of the foregoing statement. He counted 800 lashes inflicted. There was no appearance of mutiny. But though close to Armstrong at the time, he did not hear the governor make use of any such expression as "cut his heart out; cut his liver out."

Surgeon Ferrick, garrison surgeon, stated that he attended to the man, but made no representation of the punishment being too severe for him to undergo without danger; he did not appear to be more affected than men usually were. He died five days after, and from that time the surgeon had always supposed the punishment to be the cause of his death.

The prisoner addressed the jury in his own defence, representing that the garrison was in a mutinous condition, and that the punishment was inflicted on Armstrong by sentence of a court-martial held on the ground. The jury, however, found a verdict of guilty, and the prisoner being sentenced to death was executed the same month.

This must certainly be looked upon as an extraordinary case. The crime was committed twenty years before the prisoner's trial. Wall was a native of Dublin, and was allied by marriage to many noble families, his wife being a sister of Lord Seaforth. In his youth he had distinguished himself by bravery in the field. He had for many years lived an irreproachable life, and, says the *Annual Register*, "it is most probable that, "had he not himself solicited a trial by his "application to the Secretary of State, he "would never have been molested for a "transaction of so distant a date." The prisoner had been in the custody of the king's messengers in 1784, but escaped, and a proclamation was subsequently issued for his apprehension. He then remained in exile till 1801, when he wrote to the Secretary of State, informing him that he had returned to England for the purpose of meeting the charge against him.

THE CAPITAL PUNISHMENT COMMISSION.

The following are the amendments suggested by the above commission to the law of murder:—

"8. We proceed to offer such recommendations as we think expedient for altering the present law of murder. It appears to us that there are two modes in which the change may be effected.

9. The first plan is to abrogate altogether the existing law of murder, and to substitute a new definition of that crime, confining it to felonious homicides of great enormity, and leaving all those which are of a less heinous description in the category of manslaughter.

10. The other plan is one which has been extensively acted upon in the United States of America, where the common law of England is in force; this leaves the definition of murder, and the distinction between that crime and manslaughter, untouched, but divides the crime of murder into two classes or degrees, solely with the view of confining the punishment of death to the first or higher degree.

11. We have given both these plans our serious consideration, and we are of opinion that the required change may be best effected by the latter, which involves no disturbance of the present distinction between murder and manslaughter, which does not make it necessary to remodel the statutes relating to attempt to murder, and does not interfere with the operation of those treaties with foreign powers, which provide for the extradition of fugitives accused of that crime. The object proposed can be attained by a short and simple enactment, providing that no murder shall be punished with death except such as are particularly therein mentioned.

These should be called murders of the first degree; all other murders should be called murders of the second degree, and punished as hereinafter recommended.

12. We recommend therefore—

(1) That the punishment of death be retained for all murders deliberately committed with express malice aforethought, such malice to be found as a fact by the jury.

(2) That the punishment of death be also retained for all murders committed in, or with a view to, the perpetration, or escape after the perpetration, or attempt at perpetration, of any of the following felonies: murder, arson, rape, burglary, robbery, or piracy.

(3) That in all other cases of murder, the punishments be penal servitude for life, or for any period not less than seven years, at the discretion of the Court."

STAMPS ON CROWN PROCEEDINGS.

The question raised last September, whether it was necessary that stamps should be affixed to the papers in proceedings taken by the Crown, was decided in the negative, on the first day of the March Appeal Term. The argument will be found reported at page 81, 1 L. C. Law Journal. No remarks were made by the Court in rendering judgment.

ADMISSIONS TO PRACTICE.

The following are the commissions issued for the District of Montreal since the 1st January, 1866: —

Name.	Date of Examination.	Date of Commission.
John F. Leonard	2 Jan	5 Jan.
Jean Bte. deLottinville	"	31 Jan.
Jean Urgel Richard	5 Feb	5 Feb.
Louis L. Maillet	"	8 Feb.
Charles Thibeault	"	"
Joseph F. Dubreuil	"	"
Sévère Gagnon	5 March.	5 March.
Alfred Welch	2 April.	5 April.
John H. Duggan	"	"

Two other gentlemen passed the examination, but not having paid their fees, their commissions have been withheld, and their names are not inserted here.

ADMISSIONS TO STUDY.

The following are the names of those admitted to the study of the Law since the 1st Jan., 1866:—

Name.	Date of Examination.
Pierre Durand	2 January.
Aristide Coutre	5 February.
C. Boucher	5 March.
Theophile Michon	"
Joseph Brousseau	"
Adolphe Mathieu	"
Edson P. Stephens	2 April
Joseph Perry	"

LAW JOURNAL REPORTS.

COURT OF REVIEW.—JUDGMENTS.

MONTREAL, November 30, 1865.

Present:— JUSTICES BADGLEY, BERTHELOT and MONK.

LECOURS *v.* CORPORATION OF PARISH OF ST. LAURENT.

Held—*That a Corporation is liable for dam-*

ages for neglect of duty, though the damages proved appear to have been sustained by plaintiff in consequence of his own negligence.

BADGLEY, J.—This was an action of damages against the Corporation, for not having carried out a certain *procès-verbal*, and put up certain fences. For the purpose of enforcing his claim, the plaintiff served several protests, the costs of which amounted to $14. He, Mr. Justice Badgley, had rendered the judgment now sent up for revision, and he had given the plaintiff judgment for the $14, because the corporation were bound to put up the fences, and the protests were necessary to put them *en demeure* to do so. But he had not allowed damages, because the plaintiff had not kept his own fences in order, and the cattle who had done the damage would appear to have entered at these side fences. On reflection, His Honor believed he ought to have awarded the plaintiff nominal damages for the growing grain destroyed, because the plaintiff's negligence in respect to his own fences did not relieve the defendants from the performance of their duty. The defendants had not done their duty, and the judgment would be reformed, and $20 damages for each year for two years awarded to plaintiff, in addition to the $14, with costs as of lowest class Superior Court

SICOTTE *et al. v.* REEVES.

HELD—*That a party will not be allowed to fyle an answer to an articulation of facts after the case has been inscribed for review by the opposite party.*

BADGLEY, J.—The judgment in this case was correct as to the merits, and would be confirmed. But a question of procedure came up which had to be disposed of. The defendant had regularly fyled his articulation of facts, and the plaintiffs were bound to answer it, or the facts alleged would be held proved. The plaintiffs did not answer it, but inscribed the case for *enquête* themselves, and judgment was rendered. The defendant now brought the judgment up for review, and it was only now, when the case was being reviewed on the application of the opposite party, that the plaintiffs came in and said they had neglected to fyle their answer, and moved for leave to do so. It was altogether too late to permit such an application. But on the merits the judgment would be confirmed.

FELTON *v.* CORPORATION OF COMPTON AND ASCOT.

HELD—*That a sale of land without notification to the party who is the real owner, though the land stands in the name of other persons on the assessment roll, is null and void.*

BADGLEY, J.—This was a case for revision from the Court at Sherbrooke. It arose from the sale for taxes of two lots of land belonging to the plaintiff, but which were not put down on the assessment roll as his, but in the name of some other persons. The plaintiff's right to the property was clear, for he purchased one of the lots at Sheriff's sale, and he held the other under title which had not been questioned. These lots of land were charged with assessment, not against the plaintiff, but against two other persons. The municipality undertook to sell these two lots of land, and they were sold for $1.37; and the purchaser obtained deeds of conveyance, by which he was to become proprietor of the land. The plaintiff then brought his action to have the sale set aside. He said: No notice was ever given to me that my lots were subject to assessments. You knew that I was proprietor of the land. Why did you allow the name of the men on whom it was sold to continue on the assessment roll? Why did you not intimate to me that there was an assessment on this land? In selling it in the name of another party, you did wrong. The Court was of opinion, that the proprietors of even wild land, on which they did not reside, were entitled to be notified of the sale. Mr. Justice Short at Sherbrooke had adjudged the sale to be irregular, null and void, and this judgment must be confirmed.

KATHAN *v.* KATHAN.

HELD—*That where a party has inscribed a case generally on the merits he cannot afterwards say that he only intended to inscribe it in part, and final judgment on the whole case will not be disturbed.*

BADGLEY, J.—This was a case from Missisquoi. The facts of the case were as follows: An old man in the townships had several sons. He had settled his property in one way or another and had been living with the defendant. He had attained an age far beyond the period allotted to man, was perfectly blind, and was in that state of imbecility nearly bordering on fatuity, that he was unable to know right from wrong. Although this old man had been living with the defendant for some time, another brother, on one occasion, during the defendant's absence, went to the house and carried off the old man to his own house. After he had been at the plaintiff's house a short time, not knowing what was passing around him, and attended to only by the plaintiff, his wife and their son, and the door kept continually closed, the son applied to a notary resident in the neighbourhood, to come to his father's room and make a transfer of the estate. The notary, a respectable man, knowing the old man's condition, refused to go or meddle with the old man. But at last the plaintiff obtained a draft of an agreement which he suggested to his father to be executed by him. They set up the old man, the son read the paper, and then guided the hand of the old man to sign it. The old man was quite unconscious of what was passing, and, as indicative of his state, it might be mentioned, that at the time this affair was going on, and the paper was being read, he said: "Would you like to hear me whistle; I can whistle very well?" and he whistled two tunes while the ceremony was going on. It was upon the paper executed in this way that the case arose. The plea was, that the old man was insane, of unsound mind, and did not know what was going on, and that the whole transaction was fraudulent. Judge McCord had pronounced a judgment, upon the plea, that the old man was not insane. This was true,

but he was imbecile. There was a well understood difference between insanity and imbecility. But a difficulty supervened upon the procedure. Upon the previous inscription before Judge McCord, he judged upon the pleadings that the old man was not insane, but he ordered proceedings to go on and be had upon the merits. Thereupon the plaintiff inscribed the case generally on the merits, and submitted it for final judgment upon the issue between the parties, and he, Mr. Justice Badgley, had subsequently rendered judgment, expressing the opinion that the old man was fatuous, and that the agreement so made was suggested and fraudulent. That judgment now came up for revision, the plaintiff objecting that the latter judgment was irregular. But, could a party after inscribing the case generally upon the merits turn round and say that he only intended to inscribe it in part? Final judgment had been rendered upon the inscription. His Honor believed the judgment must be confirmed, and his colleagues concurred in the opinion. Judgment confirmed.

DUVERNAY *v.* CORPORATION OF PARISH OF ST. BARTHELEMY.

HELD—*That the defendant in a case in which judgment has been rendered against him in vacation, may consider the judgment as final, and inscribe the case for review without having put in an opposition, or having waited till the delay for doing so has expired.*

BADGLEY, J.—On the 18th July an ordinary writ issued at the suit of the plaintiffs, the action being brought for the recovery of $151, bill for printing a factum in appeal. The writ was returnable 31st July, and was returned in the usual way, the declaration being signed by M. as the attorney. Nothing further was done till 1st September, when the defendants fyled an apparance, which remained of record. On the 6th September a petition was presented by P., as attorney for plaintiff, ignoring M., praying that the appearance be set aside, because plaintiff was anxious o obtain an early judgment. This petition was presented in chambers, without notice to the defendants; and the judge adopted the conclusions of the petition, and ordered the appearance to be ejected from the record. This judgment was given, not in Court but in chambers, ministerially, and upon a petition signed and presented by an attorney who was not in the case. On the same day, evidence was adduced, and judgment rendered by the prothonotary as in a default case in vacation. Now an application was made on the part of the defendants to have this judgment revised. The only difficulty was to determine whether this was a final judgment or not. It was alleged that it could not be considered a final judgment till the delays for fyling an opposition, &c., had expired. But these delays were in the interest of the defendants, and if they declared, as they did: we accept it at once as a final judgment; we do not want to wait for these delays, but wish to take it up for revision, how can the plaintiffs complain? The plaintiff's motion, asking to have the inscription for review discharged, must be rejected.

MONK, J., said his reason for rejecting the defendants' appearance was that no notice of the appearance had been given, and he treated it accordingly as if it had not been put into the record.

KINGSTON *v.* TORRANCE, and Rev. JOHN TORRANCE *et al.*, T. S., and KINGSTON contesting.

Garnishees condemned to pay over moneys.

BADGLEY, J.—This was a contestation of a declaration of garnishees. A judgment having been rendered against the defendant, the plaintiff attached the sum of £2,750 in the hands of the executors of his father's estate, this sum being left to defendant by will, to be paid to him by the executors after he had attained the age of 30. The attachment took effect before the defendant had attained the age of 30. At this time the executors had the £2,750 in their hands less the sum of £500 which they had paid out. Since the attachment was placed in their hands they had paid away the balance of £2,250. Now at the time they paid this money away, they were under the obligations of the law, because the Queen's writ had ordered them to hold it. There could be only one consequence of their having divested themselves of the money: they must be held liable for it. Under these circumstances the judgment of the Court below must be confirmed.

MCDONALD *et al. v.* MOLLEUR *et fils.*

HELD—*That where the defendant pleads trouble to an action for instalments of purchase money, and offers to pay on security being given, the plaintiff should be condemned to pay the costs of the contestation.*

BADGLEY, J.—The question here was with reference to a *trouble*. The defendant purchased some land clear and free of all mortgages. Two instalments of the purchase money were transferred to plaintiff, who now applied for payment. The plea was *trouble, i.e.*, defendant said: remove the mortgages upon the land or give me security that I shall not be troubled, and I will pay you. The plaintiff did give security, and the Court had condemned the defendant to pay the full costs of the action. This would have been right if the defendant had simply asked that the action should be dismissed. But under the circumstance of the plea the Court was of opinion that the plaintiff should pay the costs of the contestation, the defendant to pay the costs up to the fyling of the plea. Judgment confirmed with this emendation.

COURT OF REVIEW—JUDGMENTS.

Montreal, 30th Dec., 1865.

PRESENT: BADGLEY, J., BERTHELOT, J., and MONK, A. J.

SCHOOL COMMISSIONERS OF THE PARISH OF ST. BRUNO *v.* CHAMPEAU.

Action to account.

BADGLEY, J. — The Court is unanimous in confirming the judgment rendered in this case. The defendant, who is the Secretary-Treasurer of St. Bruno, being called upon to render an account, came forward and volun-

tarily allowed two different persons to go over all his accounts, for the purpose of establishing the amount due. The result was that both of these persons came to pretty nearly the same conclusion as to the amount due. More than this, the defendant himself admitted that the statements fyled by these persons were right. The case was very plain, and the judgment of the Court below must be confirmed.

LASELL *v.* BROWN.

Defendant allowed to amend his plea after enquête.

BADGLEY, J.—This was a case from the Superior Court, District of St. Francis. The action was brought on an account. Certain figures were adopted as the balance then due. But there were various amounts to be paid by plaintiff, which if paid would have very materially reduced the amount due by defendant. Unfortunately, being sued, he was unable to give his instructions personally to his attorney, and the latter had not included these paid sums in his plea. Subsequently, after evidence had been adduced, application was made to the Court to be allowed to set these things up in abatement of the amount claimed. The Court below refused to allow the defendant to come in and replead. We think this was a harsh judgment, and are disposed to allow the defendant to come in and fyle his statement with repleader, but of course on payment of full costs. Judgment reformed.

CHARBONNEAU *v.* CORPORATION OF PARISH OF ST. MARTIN.

Action by widow, to recover damages from Corporation, dismissed, because the accident was the result of negligence on the part of deceased.

BADGLEY, J.—This was an appeal from a judgment dismissing plaintiff's action. The plaintiff is the widow of a man who was carting wood from St. Eustache to Montreal, and as he was going along the road to town from St. Martin, his load of wood turned over against the fence, and the man, who was between the fence and the load of wood, was killed almost immediately. The action is brought by the widow to recover damages, on the ground that the Parish did not keep the road in good order. The plaintiff should have shown that there was no negligence on the part of the deceased. The circumstances showed that there was no ground of action. The deceased went over the same road on the Saturday previous, and if it was in so dangerous a state he must have been aware of it on the Sunday night following when he was killed. His load of wood was very heavy, and the wood very long. The night was dark, and deceased, while leading the horses, gradually drew the sleigh into the ditch, so that it turned over. Shortly before the accident he had changed places with his companion, saying that he would go to the side of the vehicle and hold it up on the side where it turned over. It was very foolish of him to suppose that he could hold up a very heavy load of wood. It was in evidence that many parties had passed over the road the same night without suffering any inconvenience, and he would also have escaped had he not gradually diverged from the centre of the beaten road, and driven his horses at last into the ditch on the roadside near the fence, when his load upset upon him. Under the circumstances, the judgment dismissing plaintiff's action must be confirmed.

TURGEON *v.* TURGEON.

HELD—*In an action for separation de corps et de biens, the proof being only sufficient to establish mere incompatibility of temper, that such incompatibility cannot justify a judicial divorce.*

BADGLEY, J.—This was an action brought by a wife against her husband for separation *de corps et de biens*, after they had lived together for nearly thirty years, and after their children had grown up to be almost men and women, the oldest daughter being 19 or 20. It was easily conceivable that during this long period the husband may have been more or less violent at times. The only question was whether *sevices* had been proved. The only proof of this was made by the two eldest children, the one a daughter, aged 19, and the other a son, aged 16. The principal thing proved was that on one occasion, when the husband came in and found his soup cold, he asked his wife how that happened. She gave him a very impertinent answer, and thereupon some abusive language passed between them; and that some time previously the husband had given the wife a kick. but all this occurred long ago, and had been condoned by subsequent harmony. There was no proof of general ill-treatment; on the contrary, unexceptionable witnesses, relatives, strangers and servants, referring to many years of their intercourse with the parties, proved nothing against him. The servants stated that he was a rough man, but that the wife was also rough. Mr. Justice Smith dismissed the action, and we think his judgment should be confirmed. It is not on account of a mere incompatibility of temper between husband and wife that the law authorizes a separation. This Court has not the power to divorce parties from such incompatibility of temper; and as the only evidence of *sevices* is by these children, which is not sufficient against all the other testimony adduced in the case, the judgment must stand.

MONK, A. J., had great difficulty in concurring in this judgment. It was established that the defendant's conduct was perfectly outrageous and it was proved, moreover, that he was a drunkard. The proof, however, had not brought the ill-treatment down to so recent a date as to justify the Court in granting a separation. It was hoped that the parties would make a virtue of necessity and live peaceably together in future.

TREMBLAY *v.* VADEBONCŒUR and TREMBLAY, opposant, and DUBOIS, opposant, contesting.

Judgment, homologating report of experts as to value of rente, confirmed.

BADGLEY, J.,—This case came up on a judgment of distribution of money, proceeds of property sold. The only difficulty in the case was to

ascertain the probable lifetime of the opposant, and two modes had been suggested for the purpose; one by an *expertise* of medical men, and the other by taking the statistics of the Insurance Companies. In this case an *expertise* was resorted to, and medical men were appointed to ascertain the value of this man's life. On the 6th June, 1865, they examined the physical condition of the subject, made careful calculations, and it was decided that he would have five years and four months to live, which would bring his age up to seventy. The Court was disposed to adopt this statement. The *rente* at £40 a year would amount altogether to £258 for the estimated time, and this sum, being a *bailleur de fonds* claim, would absorb the whole proceeds to be distributed. Judgment confirmed.

LACOMBE *et al. v* LANCTOT.

HELD—*That a demand made upon a trader, under the Insolvent Act of* 1864, *requiring him to make an assignment, will be dismissed, when it appears from the proof that such demand was made for the purpose of enforcing payment of a particular debt.* 27 & 28 *Vic., cap* 17, *sec.* 3.

BADGLEY, J.—This was a proceeding under the Insolvent Act. Messrs. Lacombe and Perrault notified the defendant to make an assignment. The latter fyled a petition under the Act, setting up that he was not insolvent, and that Lacombe's claim was not a commercial debt. The facts were as follows: At the time of his marriage, Lanctot, son-in-law of Lacombe, was living in Sherrington, at a considerable distance from Laprairie where Lacombe was of old standing in business. Lanctot came to settle in business at Laprairie, and possibly was a rival in business of his father-in-law. They had some transactions together, which resulted in a certain balance being due by Lanctot, for which Lacombe obtained judgment against him. Lanctot had given instructions to his attorney to fyle contra claims against the amount demanded, but, owing to the absence of the attorney, these claims were never fyled in offset. After the judgment had been obtained, Lanctot entered into partnership with Dandurand at Laprairie; and it was shown by the evidence of record that they were substantial merchants, paying their way, and doing a considerable business. There was no claim against the firm, the claim was against Lanctot individually, made after his entering into the partnership. Now a reference to the Insolvent law shewed that the fact of this debt existing was not sufficient ground to justify proceedings in bankruptcy. The other creditor, Perrault, had never previously asked for his money, so that there was no refusal to pay his claim. The chief claim before the Court was this claim of Lacombe, and he swore positively that he forced the defendant into bankruptcy to get himself paid. The Act specially excluded the case of a creditor proceeding under the Act solely for the purpose of enforcing his own claim. As to the other objection of the non-commercial nature of Lacombe's debt, it appeared that it was a commercial debt, but on the first ground the Court was of opinion that the judgment must be revised and reversed, but without costs.

MONK, A. J., who rendered the judgment now reversed, observed that the point on which the Court based the present decision had not been brought under his notice before.

COURNOYER *v.* TOURQUIN *dit* LEVEILLE.

HELD—*That where a motion to amend declaration has been allowed, the amendment must be made on the face of the declaration, and an opportunity given to defendant to replead, before judgment can be rendered.*

BADGLEY, J.—This was an action brought by an old man for value of services performed for his nephew during a number of years. After the *enquête* was completed, the plaintiff found it necessary to amend his declaration, and having made a motion for leave to amend, the application was granted, and he paid to the counsel for the defendant, the costs of the amendment. But, unfortunately, the case remained as it was, the amendment not having been made on the face of the declaration. The Judge in the Court below passed over this and gave judgment on the merits. We think that the amendment should have been put on the record before judgment, because the other party might have had something to plead. We cannot permit the defendant to be foreclosed from repleading to an amendment which changes the face of the declaration. The judgment will be that plaintiff amend his declaration and give notice to the defendant to plead. If the latter does not wish to plead the case may be sent up again.

BOUVIER *v.* BRUSH *et al.*

HELD—*That the omission, after oppositions fyled with Sheriff, of publications at the Church door, of the day of sale under an execution, will not invalidate the subsequent sale of the property under the venditioni exponas.*

BADGLEY, J.—A writ of execution was taken out at the suit of the plaintiff, and certain property was seized as belonging to the defendant. The Sheriff proceeded to advertise the sale in the usual manner, but long previous to the date of sale, oppositions were fyled in his hands. Thereupon he did not make publication of the sale at the Church door, but the advertisement was continued in the *Canada Gazette*. When the *venditioni exponas* issued, there was no opposition to the sale on the part of the defendant. He knew the sale was to take place, but only reserved to himself the right to bring the present action against the Sheriff and the *adjudicataire*. He alleges collusion, and says that neither could the Sheriff give, nor the *adjudicataire* obtain, a good title, because there had been no notification or publication at the Church door of the day of sale under the execution. Now, the Statute says that the Sheriff shall not suspend the advertisements, but what would have been the use of making the publication at the Church door when he knew that he could not proceed at all? Upon the writ of *venditioni exponas* proper publications and notices were made, and the sale took

place in the presence of the defendant, without any legal objection on his part. He has now brought his action to set aside the *decret*. We think he is not entitled to succeed in this action, and that the judgment at Industry Village must be confirmed.

MONK, A. J.—The publications were regularly made in the *Canada Gazette*, but were entirely omitted at the Church door. He was of opinion that in this case the writ of *vend. ex.* might go out, as previous publication would be an utterly useless waste of money.

BERTHELOT, J., dissented from the majority of the Court, being of opinion that the publication of the sale under the execution should have been made at the church door, and that the absence of this formality invalidated the sale under the *venditioni exponas*.

RUSSY *v.* LAMOUREUX.

Action to recover damages. Judgment dismissing the action confirmed.

BADGLEY, J.—This was a case from the District of Richelieu. The action was brought to recover damages for injuries alleged to have been sustained by the *Seaflower*, in the spring of 1862, at Sorel. The vessel was lying on the North shore when the ice in the Sorel harbour gave way, and carried down the *Seaflower* to the middle of the channel. As in this position she impeded the efforts which were being made to save the vessels, and as she had no known proprietor, the Harbour Master, with the consent of Voligny, agent of the Richelieu Company, brought her to her former position, and it was supposed that she had been secured in a place of safety. But some nights after, when the water rose from the St. Lawrence ice coming down, the vessel not being fastened to the shore was carried down and landed on the river's bank, half a mile lower down, where she lay during the ensuing summer and was much injured. The value put upon the vessel had been greatly exaggerated; but, apart from this, the defendant could not be held responsible for damages, the act complained of being the act of the Harbour Master with the consent of the agent of the Richelieu Company; and therefore the judgment dismissing the plaintiff's action would be confirmed.

COMMISSIONER OF INDIAN LANDS *v.* JANNEL.

HELD—*That the sale of Indian Lands without authority from the Commissioner is illegal.*

BADGLEY, J.—The defendant having bought a piece of land from the Abenaqui Indians without any authority from the Commissioner, the latter brought the present action to revendicate this land, as sold without any authority from him. The plea was that the land was out of the precincts of the Indian Village. The statute did not draw any distinction of this kind. It extended to all the lands of the tribe. The defendant never got any authority, though others did. There was no doubt about the land in question belonging to the Indian tribe. The statute was precise; and therefore the judgment of the court below in favour of the plaintiffs must be confirmed.

SUPERIOR COURT.

Montreal, 30th December, 1865.

BERTHELOT, J.

IRISH *v.* BROWN.

Motion to reject exception à la forme attacking the truth of bailiff's return, dismissed.

In this case a writ of *saisie-arrêt* before judgment had issued, and a motion was made to reject the exception *à la forme*, because it attacked the bailiff's return, and it was contended that the bailiff's or sheriff's return could only be attacked by an inscription *de faux*. The defendant replied to this that it was necessary in the first place to fyle an exception a la forme in order that there might be some proceeding on which to base an inscription *de faux*, if he chose to take that proceeding subsequently. Motion for rejection of exception dismissed.

CIRCUIT COURT.

FERGUSON *v.* JOSEPH.

Prescription of thirty years for overhanging trees.

This was an action to recover $100 damages, said to have been caused to the garden and fruit trees of the plaintiff, by the growth of seven poplar and willow trees close to the fence dividing the plaintiff's property from that of the defendant. The plaintiff alleged that these trees had extended their roots and branches so that the latter overhung his property, and that caterpillars, insects and worms had migrated from the defendant's poplar and willow trees to the plum and other fruit trees of the plaintiff, and had done considerable injury. The plea of the defendant was that the poplar and willow trees had stood there for more than thirty years, in fact for fifty or sixty years, without any objection being raised by plaintiff or his predecessors, and that prescription had been acquired. The Court was of opinion that prescription had been proved, and that it was not through the fault or negligence of the defendant that the damage complained of had been suffered. The plaintiff's action would therefore be dismissed with costs.

MONK, J.

LEROUX *v* BRUNEL.

Action to recover damages for slander; $50 awarded.

This was an action of damages for slander. The defendant was about to purchase some property from Lachapelle, a brother-in-law of the plaintiff, but he had refused to execute the deed, at the instigation of the plaintiff, and an action had been brought against him which was now pending. On the 5th of April, 1864, Lachapelle received a most extraordinary letter, in which the defendant (who seemed to be a man of education, and who was probably annoyed that Leroux should have interfered with the sale) proceeded to put Lachapelle on his guard against his brother-in-law, the present plaintiff, and depicted him as a scoundrel in almost every form that could be imagined.

It was said that the letter was only intended to put things right. If the allegations of the letter had been true, there might be some mitigation of damages, but there did not appear to be any evidence of the charges. Moreover, this letter was written to an intimate friend of the plaintiff, and to a man who could not read writing, and was obliged to get a friend to read it to him. This friend read it, and then it was given to Leroux to read. Leroux seeing the extraordinary nature of the letter, went to a notary and had it read again. The notoriety thus given to the contents was almost inevitable from the circumstance of Lachapelle being unable to read. Damages would be awarded, but the Court was of opinion that fifty dollars would be sufficient.

MARTIN *v.* BRUNEL.

Action by bedeau, for annual quart de blé dismissed.

This was an action brought by the *bedeau*, or beadle, of the Parish of St. Anne of Varennes, against a farmer of the same place, to recover three quarter bushels of wheat, or 75 cents, the equivalent thereof. The plaintiff set up that on the 12th April, 1784, the parishioners of Varennes held a meeting at the *Presbytère*, and made a regulation by which it was decreed that each parishioner should contribute annually to the *bedeau* a *quart de blé*, as a remuneration for his services. The original minute had been deposited with Archambault, Notary, on the 24th March, 1845. Subsequently, the *bedeau* agreed to accept 25 cents in money instead of the wheat. It was further alleged that defendant, though liable for this contribution, had refused to pay the same for three years. The plea denied the validity of the impost, and also set up that plaintiff was not the *bedeau* of the Parish, but was only employed by the *curé*, another officer having been engaged by the Parish. The Court, considering the plaintiff's action unfounded, dismissed the case.

SUPERIOR COURT.—DISTRICT OF BEDFORD.

1865.

JOHNSON, J.

AITCHISON *v.* MORRISON.

HELD—*That a report of provincial land surveyors, acting as experts, will be set aside on motion, if the surveyors have not been sworn, though the rule appointing said experts does not order that they shall be sworn.*

In this case the plaintiff by his counsel moved to revise the interlocutory judgment rendered by Mr. Justice McCord, homologating the report made by three provincial land surveyors who had been appointed to make a survey. This report had been concurred in by all three surveyors, and duly homologated, on motion of defendant, on the 17th May, 1864. The plaintiff moved that this judgment be revised and the report set aside, because the *experts* had not been sworn. The rule did not order that they should be sworn, and they were described in the rule, &c., as "sworn Provincial Land Surveyors." (being public officers acting under their oath of office.) Mr. Justice Johnson rendered judgment, setting aside the interlocutory judgment, and rejecting the report on the ground that it was illegal in consequence of the *experts* not having been sworn.

CIRCUIT COURT.

Montreal, 13th Dec., 1865.

MONK, A. J.

BRADY *v.* AITCHISON.

HELD—1. *That a surveyor is entitled to his fees and disbursements from the party who named him expert, though the report has been set aside by the Court on the ground that the experts were not sworn.*

2. *That the tariff established by Consol. Stat. Can., cap. 77. sec.* 108, *subsec.* 5, *by which the time of a provincial land surveyor attending a Court in his professional capacity is valued and taxed at* $4 *per day, may be disregarded by the Court, and the sum reduced at the discretion of the judge.*

3. *That though a written promise to pay the account sued on, acknowledged by the defendant on oath, is the only evidence adduced, such written promise may be taken as proof of part of the account, and not of the whole.*

This was an action brought by J. Brady, the surveyor named by Aitchison in the case reported above, under the rule of Court, for the purpose of surveying the property. The sum claimed as due was $67, viz., $56 for 14 days actual work, and $11 travelling expenses. The plaintiff's proof consisted of a promise by defendant in writing to pay Mr Brady's account for the survey without further trouble, this promise being in answer to a letter by plaintiff's attorney, requesting payment of $67 amount of plaintiff's account for survey. The plea was that the work was not completed properly; and further that the report had recently been set aside by the Court, because the surveyors had not been sworn. Hence the work had proved to be useless to defendant, and the surveyors were not entitled to any remuneration. On the part of the plaintiff it was urged that all three surveyors had concurred in the report, and it had been duly homologated by Mr. Justice McCord on the 17th May, 1864. Had the defendant, Aitchison, acquiesced in this judgment, there would have been no necessity for another survey; but, on the contrary, his counsel had succeeded in getting the judgment homologating it set aside on the purely technical ground that the surveyors, who were sworn public officers, had not been sworn afresh when appointed to do this work. With respect to the amount of remuneration claimed, the plaintiff urged that the promise to pay the account for the survey covered the amount claimed, which was at the rate of $4 per day, being the tariff rate established by chap. 77, C. S. C., sec. 108, for surveyors attending a Court *in their professional capacity*. Mr. Justice Monk said the report having been homologated, the pre-

sumption was that the work had been properly done. Nevertheless it had proved to be utterly useless to defendant. However, as the rule appointing the experts did not direct that they should be sworn, this could not debar the surveyors from claiming remuneration, especially as it was through defendant's persistent endeavours that the report had been set aside. It might be doubted whether the judgment rendered by Mr. Justice Johnson was correct, surveyors being public officers acting under an oath of office. The plaintiff must have judgment, but as to the amount of remuneration, he would not pay any regard to the statute cited, and would fix the rate at 7s. 6d. per day. (No suggestion had been made by defendant at the trial that the rate charged was too high.) Judgment for $1.50 per day, and travelling expenses.

SHEFFORD CIRCUIT COURT,—DISTRICT OF BEDFORD.

Before Mr. Justice Johnson.

23rd January, 1866.

WOODARD *v.* AURINGER.

Action to revendicate certain oxen, which defendant claimed to have been purchased by him with a term of payment not yet expired.

On the 14th Sept., 1865, plaintiff instituted the action in this cause, and alleged in effect that on the 22nd Sept., 1862, defendant leased from him a pair of three years old steers for two years; that in acknowledgment of this agreement, defendant then and there signed and delivered to him a paper writing in the following words: "This is to certify that I "have this day taken one yoke of three years "old steers to be returned two years from this "date, in good working order, to Mr. Silas H. "Woodard;" That on the 22d Sept., 1864, when the defendant should have returned the oxen to him, they were worth $91; That the defendant never returned the oxen, although requested so to do. Conclusion for $91 and interest, unless defendant chose within eight days to give up the oxen to him. The defendant met this action by a *défense en fait*, and also by a second pleading, alleging that at the expiration of the two years referred to in the declaration, he returned the oxen to plaintiff, and the latter then and there, viz., on the 22nd Sept., 1864, allowed him to keep the oxen till the following spring, and that therefore the agreement of September, 1862, sued upon was at an end and became extinct;—That on or about the 15th June, 1865, while the oxen were in his (defendant's) possession, plaintiff sold them to him for the sum of $55, which defendant agreed to pay 1st January, 1866, and interest; That thereby defendant became the owner of the oxen; That at the time of the action this sum was not yet due.

At *Enquête*, plaintiff proved that the defendant had the oxen, and that their value in September, 1865, was $91, and the defendant sold them for that price a short time before the date of the action. One of his witnesses proved that on the 15th June, 1865, the plaintiff sold the oxen to defendant for $55, to be paid with interest on the 1st Jan., 1866; and that a cow was turned out by defendant, and it was agreed that if the defendant did not, on the 1st Jan., 1866, pay plaintiff the said sum, the cow would be forfeited. Interrogatories *sur faits et articles* were submitted to the plaintiff, and amongst others the following: "2. Is it not true that on or about the 22nd Sept., 1864, you allowed the defendant to keep the pair of oxen in question till the month of June in the spring following?" Ans.: "I allowed him to keep them." 3. Is it not true that on or about the 15th June last, while the said pair of oxen was still in defendant's possession, you sold the said two oxen to the defendant in the presence of Peter Papin and one Jeannreil?" Ans.: "I agreed to sell them if he paid me, and the oxen were to be security for themselves." 4. Is it not true that the price for which you sold the said oxen to defendant was $55, which the defendant agreed to pay to you with interest on the 1st Jan., 1866? Ans.: He agreed in the fall before to take them on those terms, if he paid for them, the cattle to be security for themselves. In his answers to subsequent interrogatories plaintiff says that he told William Thompson, Andrew Auringer and one Bourgard, that he had sold the oxen to defendant if he paid for them. The defendant attempted to prove by witnesses the precise terms of the sale of the oxen on the 15th June, 1865, and the term of payment up to 1st Jan., 1866, contending that the plaintiff's answers to interrogatories were a sufficient *commencement de preuve* to allow parol evidence, but the Court declared parol evidence inadmissible, unless it went *only* to explain the bargain made in the fall of 1864, alluded to by the plaintiff in his answer to the fourth interrogatory, and no other bargain. At the argument it was contended on behalf of the defendant that the plaintiff's action could not be maintained; That the lease of Sept., 1862, which formed the basis of the action, had long ago become extinct, and new agreements had taken its place. That it was evident either that a new lease, a sale or a promise of sale of the oxen by plaintiff to defendant had taken place, and that the old lease had expired, and that it mattered not whether this new agreement had taken place in the fall of 1864 or in the summer of 1865. The action upon this old lease could no more be maintained than an action upon an old account settled by note or otherwise; That, moreover, taking the plaintiff's own construction *that he had agreed to sell the oxen to defendant if he paid for them on 1st Jan.*, it was evident that the action was premature, and that defendant owed nothing to plaintiff in September, 1865.

The Court held that such agreements must be equitably interpreted; That the plaintiff had never relinquished his claim under the lease sued upon; That, after getting the plaintiff's oxen and disposing of them, the defendant pocketed the proceeds, and now wished to go scot free; That the Court would not support such pleadings, and judgment would go for plaintiff, not for the $55 and interest at 12 per cent., because plaintiff had prayed for simple in-

terest, but for the full amount demanded, $91, interest and costs.

Huntington and Leblanc, for plaintiff; Cornell and Racicot, for defendant.

(E. R.)

[The questions submitted were simple questions of law: Could Woodard, after allowing defendant to keep the oxen, and agreeing to sell them to him, sue on the old lease? And, moreover, plaintiff having admitted under oath *a sale of any kind*, the defendant should have been allowed to adduce verbal evidence of the bargain. Auringer bought the oxen and was to pay for them on 1st of January, 1866, how could he be sued on that old lease which had long ceased to exist? E. R.]

COURT OF REVIEW—JUDGMENTS.

Montreal, Feb. 28th, 1866.

PRESENT: SMITH, BADGLEY, and MONK, J.J.

RYLAND *v.* ROUTH, AND OTHER PARTIES.

INSOLVENT RAILWAY CO.—LIABILITY OF SHAREHOLDERS.

HELD—*That a shareholder of an insolvent Corporation cannot offer a debt due to him by the Corporation, whatever may be the character of such debt, in compensation to a claim against him by a creditor of the Company, under C. S. C., c. 66, s. 80.*

BADGLEY, J.—The difficulty in this case is not between the intervening parties and the other parties to the record, but simply between the plaintiff and the defendant. By the statute respecting Railways, cap. 66, Consol. Stat. Can., section 80, it is provided that "each shareholder shall be individually liable to the creditors of the Company to an amount equal to the amount unpaid on the stock held by him, for the debts and liabilities thereof, and until the whole amount of his stock has been paid up; but shall not be liable to an action therefor before an execution against the Company has been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recoverable with costs against such shareholder." Mr. Doutre, Deputy Registrar, held a claim due to him as such Deputy Registrar against the Montreal and Bytown Railway, a Company incorporated by charter, and under the provisions of the general clauses Railway Act. He transferred the debt to the plaintiff, and judgment was obtained for the amount of it; execution issued, and the return to the execution showed that there was nothing in the hands of the Company; that it was insolvent, in fact. The plaintiff now claims from defendant, a stockholder, an amount equal to his unpaid stock. The defendant is a shareholder to the amount of £500, of which fifty pounds have been paid, so that there are £450 still due. The case, therefore, comes under the clause of the statute cited above, by which shareholders are individually liable to the amount of their unpaid stock, provided the creditor has done what the law requires of him, viz., levied execution, &c. In this instance the execution against the Company has been returned unsatisfied, so that the right of action is undoubted. The plea sets up a matter of compensation, alleging that Mr. Bellingham, who was a clerk in the employ of the Company, and a privileged creditor for certain arrears of salary, has transferred to defendant the amount of this debt, and therefore, defendant is entitled to set off this claim. We are of opinion that this exception cannot be maintained, and for this reason:—The defendant is a debtor to the Corporation for the amount of his unpaid stock. This is the capital which the Company use for paying their debts. No debt due by the Company can be offered in compensation by a partner to an action by a creditor of his Company. The defendant has taken up a chirographary debt, and endeavours to set it off against a creditor. The statute is clear enough: it says that each shareholder shall be liable individually for the amount of his unpaid stock. The law has resolved the corporation into its elements, and considers the shareholders individually as divested of any corporate character, in fact, as partners, with the privilege of limited liability to the amount of unpaid stock. Redfield on Railways, p. 608, shows that corporators are held liable as general partners, after the Corporation has become insolvent, for their unpaid stock. Under these circumstances we do not think it right to admit the plea of compensation. We take no notice of Mr. Bellingham. Judgment will, therefore, go for £450, amount of the unpaid stock.

MONK, J.—The Court goes to this extent, that whatever may be the character of this claim, it cannot be put in compensation.

Judgment of the Superior Court confirmed.

CUSHING *v.* HUNTER, and EASTERN TOWNSHIPS BANK, *Tiers Saisi;* HUNTER, opposant, and CUSHING contesting.

OPPOSITION TO JUDGMENT.

Judgment was rendered against the defendant by default, for a larger sum than was actually due, and the proper delay between service of summons and return was not allowed.

HELD—*That the rule as to opposing judgments within eight days after service is not law in Lower Canada, and that the defendant had the right (especially under the peculiar circumstances of the case) to file his opposition any time within thirty years after judgment.*

BADGLEY, J.—This is an action brought for $1138, on a bill of parcels. But upon the face of the bill of parcels, it appears that a deduction was made of over $300, leaving a balance of $759 due. Now plaintiff sued for the full amount of $1138, without giving him credit for the sum which he had agreed to deduct. Default was entered against defendant, and judgment was obtained by default for the full amount, $1138, on plaintiff's affidavit that this sum was due. A *saisie-arrêt* was taken out, but nothing was done under it. Then execution *de bonis* and *de terris* issued, but the defendant had no goods and chattels, and the only land he had was under seizure at the suit of another creditor, and it yielded nothing, the proceeds being absorbed by mortgages. After all these proceedings,

the plaintiff seized a sum of money belonging to defendant in the hands of the Eastern Townships Bank. Now the defendant comes in and files an opposition to the judgment, upon the ground of short service of the writ on which the original judgment was rendered. He was entitled to certain delays, and it is evident upon the record that the proper delay was not allowed. He pleads this, and is met on the other side by the allegation that the defendant was aware of this judgment against him, that he took no steps to have it set aside, and thereby acquiesced in the judgment, though it was rendered upon an informal service. The defendant answers that he had thirty years within which to come and make his opposition to the judgment, and that he was not precluded from this by the statute respecting judgments by default. A number of authorities have been adduced on both sides. The rule is laid down in Pigeau, who says that by the Ordinance the judgment is to be opposed within eight days after service of the judgment; but he adds that the requirements of the Ord. have been set aside by the jurisprudence, and are no longer law, and that the full thirty years time is allowed. But if the eight day rule was law in France for default judgments, it is not so here according to our jurisprudence and practice, because such judgments are not served, and here there was no signification of judgment, and, in fact, this rule only applies to judgments in the last resort. The defendant having the privilege of fyling an opposition within thirty years is not to be held bound by his knowledge of the judgment. Such knowledge did not constitute an acquiescence, which the authors fix by some express or implied affirmative act of the defendant. Taking into account then the extraordinary nature of the judgment, rendered for a much larger sum than was due, on the one hand, and the want of acquiescence on the other, we think the judgment cannot stand, and must be reversed.

Judgment reversed.

Present: BADGLEY, BERTHELOT, and MONK, J J.

GUEVREMONT *v.* PLANTE.—

COURT OF REVISION, POWERS OF.

HELD—*That a decision of a magistrate under the Agricultural Act is not susceptible of revision by the Superior Court sitting in Review.*

BADGLEY, J.—This is a case from the District of Richelieu. The action was brought under the Agricultural Act for allowing a pig to go at large against the requirements of the law. The case was brought before a magistrate, and the defendant was condemned to pay the fine provided by statute. Very strangely, by the judgment, the penalty was to be enforced within eight days. But the plaintiff at once fyled a paper, saying that he would not enforce judgment till the full delay of fifteen days. This, however, is not the difficulty here. The judgment was then taken by appeal to the Circuit Court, District of Richelieu, and the Circuit Court confirmed the judgment of the magistrate. Application is now made to this Court to revise that judgment, and a motion is put in, as preliminary to any proceeding, by which the inscription for revision is moved to be rejected, because there is no power in this Court to revise the judgment of the Circuit Court. The Agricultural Act provides for an appeal to the Circuit Court, but it provides for nothing farther. The Superior Court sitting in Review can only take up judgments in cases that are appealable to the Court of Appeals. The motion to reject the inscription must be granted, and the record ordered to be remitted.

Inscription rejected.

Ex parte SPELMAN and DAVIS, informant.

COURT OF REVISION, POWERS OF.

HELD—*That the test of a case being subject to revision by the Superior Court sitting in Review is whether it is appealable or not; and the right of appeal to the Queen's Bench on Certiorari being taken away by Statute, there is no right of revision in such cases.*

BADGLEY, J.—There are four cases under this title. A point comes up somewhat similar to that which arose in the preceding case. Davis, the prosecutor, had sued a man under one of the clauses of the Revenue Act for a breach of the conditions of the Act, in failing to enter in his Book a larger quantity of malt or grain than was stated, and by that means he had contravened the statute and subjected himself to a penalty. Much pains has been taken to show that the conviction was bad. We shall not proceed to enter into those details at present, because we are met *in limine* by an objection which covers the whole case. The right of appeal to the Queen's Bench on *Certiorari* is taken away absolutely, leaving only an appeal to the Court of first instance. The convictions were brought up before the Superior Court and were maintained. Now the point is this: Is there a revising power in this Court to revise the judgment of the Court of first instance? We are of opinion that there is not, and for this reason: The Judicature Act of 1864 provides that any party aggrieved by a final judgment rendered in the Superior Court, or in any appealable case in the Circuit Court, may have the case reviewed before three judges, &c. See also the 25th section. The test, therefore, of the case being subject to revision is whether it is appealable or not. The statute says there is no appeal on *Certiorari;* we, therefore, say there is no revision. Therefore, the judgment of the Court must stand, and the proceedings in revision must be dismissed. No costs on revision to be allowed.

Appeal dismissed.

DESJARDINS *et ux. v.* PAGE, and DUMOULIN, opposant, and DESJARDINS *et ux.* contesting.

FRAUDULENT SALE.

The defendant, five days before judgment was obtained against him, sold his farm and his stock to the opposant, who leased the property back to him two days after the judgment.

HELD—*That the transaction was fraudulent, and that there was no tradition of the property, Monk, J., differing as to the latter point.*

BADGLEY, J.—This is a matter in appeal from

the Superior Court, District of Terrebonne. The plaintiff, on the 29th Jan., 1862, instituted an action against the defendant on his promissory note for $200. Judgment was rendered on the 13th February, 1862, fifteen days after action brought. On the 8th Feb. of the same year, the defendant sold to the opposant his farm and all his stock on the farm for the consideration stated on the face of the deed. On the 15th Feb. following the opposant leased back to the defendant the very same stock which he had purchased by the deed of the 8th, so that there was only an interval of seven days between the deed and the lease. The consideration was the payment of a *rente viagère*, equal to 4000 livres, a mortgage debt of 4000 livres more and a balance of 600 livres, amounting to 8,600 livres in all. The object evidently was to get the farm and stock out of the reach of the impending judgment. The opposant himself admitted this, he having said at the time, "we must take care of the judgment. If the judgment goes we can do nothing." The defendant, too, had said he would not pay the plaintiff the amount of her judgment because she had treated him badly. After the sale it was considered necessary to remove certain effects to opposant's land which immediately adjoined that of defendant, so that it was merely carrying the things across the dividing line. It was stated by one of the witnesses that the property was not removed to the adjoining land till five or six days after the deed of sale; consequently it could not have been placed on opposant's land till a day or two before the judgment was rendered against defendant. Under these circumstances we do not think the opposant was in good faith in these transactions. The question now comes up with reference to the transfer of the personal property. Two or three days afterwards the whole of this property was returned to the defendant, and it was the defendant himself who took charge of the cattle while upon the property of the opposant as well as upon his own. Shortly afterwards, with the opposant's privity, he sold part of his property to another person to pay another debt. Under all these circumstances there was fraud in the transaction between the defendant and opposant. We, therefore, think the judgment has hardly gone far enough, because the deed might have been resiliated on the ground of fraud. The judgment is limited to holding that the tradition was not a serious one. We think this correct, for it was never intended between the parties to be a serious tradition. The property sold at a little over 8,000 livres is proved to be of the value of 12,000. The contract was made *in fraudem creditoris*. The judgment of the Court below must be confirmed with costs against the opposant.

MONK, J.—I do not quite concur in the *motifs*. I am of opinion that there was a delivery of the moveable property; but I concur in the judgment, because the case is remarkably conspicuous for fraud throughout. The evidence of collusion between the parties is most decisive, the whole object of the transaction being to prevent the plaintiff from recovering his debt.

Judgment confirmed.

MARCOTTE *et al. v.* HUBERT.—

Action for work and labour done in making estimates.

BADGLEY, J.—This was an appeal from the Circuit Court, Montreal. The action was brought by architects to recover the value of certain work. The object was to establish and state in detail in writing the value of certain properties on Notre Dame street about to be demolished by the Corporation, that is, the cost of taking down the old buildings and of putting up new ones. Defendant went to the plaintiffs as professional men, and engaged them to do this work. It did not require professional men to make such estimates, but having engaged them he should have been willing to pay a rate corresponding to their position. The difficulty in the case arose from the testimony of record. A certain amount had been offered by the defendant as the value of plaintiffs' services. The evidence was very contradictory. Six or seven architects had been brought up, and of course stated the price that they would have charged if they had been employed to make plans and specifications which were the same as if they had been going to superintend the erection of the buildings themselves. This was perfectly justifiable evidence; but, unfortunately, upon the other side of the question we had architects and mechanics of good standing who said, after looking at the work, that plaintiffs were not entitled to anything like the amount that was claimed by them. They said it was not a description of work which required an architect at all. It was a work which an architect might do, but it did not require the minute calculations of the value of every window and door, and plank of the floor, &c., that were charged for. Although, therefore, we might have been disposed to go beyond the figure established by the Court below, still, taking the whole circumstances into consideration, and the fact that the amount of the judgment had been paid, the Court would not touch the judgment.

Judgment confirmed.

QUENNEVILLE *v.* MUTUAL INSURANCE CO.

INSURANCE.

Owing to vagueness in the specification it was difficult to identify the barn destroyed, and the amount insured on it. The decision was based mainly upon the exhibits, but the majority (Badgley, J., differing) appeared to be of opinion that the reception, by the Secretary, of a premium for additional insurance after the fire, was, under the circumstances, an acknowledgement by the Company of plaintiff's pretensions.

BADGLEY, J.—In this case I am obliged to dissent. In 1862 the plaintiff made an application for insurance to the Mutual Insurance Company, and gave in certain statements of the property on which the insurance was to be effected. He had a great number of properties, but there was only one to which the contention applied. Upon one lot described as Terre No. I, there were several buildings erected. On the front of the lot was a stone house in which the plaintiff lived; then, adjoining, there was a *large grange* 80 x 30, a stable and other buildings. In the rear there was a wooden house, and an-

other *grange* 60 x 30. The Court is left in great doubt in this case, because there is nothing to show what the intention of the parties was, with respect to the amount insured on each building, except what can be gathered from the papers of record. The buildings were all numbered, and I am of opinion that the plaintiff, taking into consideration his dwelling houses first, had first insured the dwelling house on the front, and then that on the back of the land; then coming to his barns and outbuildings, again he came to the front and insured for £50 the large *grange* which he considered the most valuable, and then, following out the specification which he himself had given, he took the adjoining *écurie*. Then going again to the back, he insured the *grange* in the rear, at £25. Now, unfortunately for the plaintiff, it was this barn which was burnt. The plaintiff contended that this *grange* was that insured for £50. The only question, therefore, is whether the *grange* which was insured at £50 was the one in the front or that in the rear. The *grange* in the front, which was the most in use, containing his cattle stalls, his farm stock, and much the larger barn of the two, and moreover had an *écurie* stable adjoining, which the rear barn had not, is that which, according to my view, was insured for £50; and the one in the rear, where no cattle were kept, is that which was insured for £25. The fire took place in 1864, two years after the insurance had been effected. The plaintiff who had left his policy in the hands of the Company, went to the office after the fire, and told the Secretary that one of his barns had been burnt. After having referred to his policy, he said the barn which was burnt was the £50 barn. Of course it was his interest to get the larger sum, and this, I believe, was the reason he fixed the £50 insurance on the barn that was burnt. Two or three days after, he returned and made application to have his insurance increased on all his properties by additional sums on each—together $750; and, among them, adding £75 to the insurance on the front barn. This was simply an application made to the clerk of the Company. The clerk had no authority to accept it; it was for the directors to adopt the application. But he left with the clerk the additional premium for the whole increase, £2 7s. 9d. What followed? The Company selected three of their members to go upon the farm, and ascertain the amount of the damage, and see which was the barn that was burnt. The three directors having made their examination, reported that the barn that was burnt was the £25 barn. The Company after adopting their report sent a letter to the plaintiff notifying him that the £25, which they alleged to have been the insurance on the barn burnt, was ready to be paid to him, and that he might have the additional insurance; but that it would be necessary for him to call at the office and rectify some errors in the description of the properties generally as stated by him. I cannot concur with my colleagues in thinking that the clerk could bind the Company without their acquiescence. It was not till the 9th November following that the $750 additional insurance was spoken of, and then it was intimated by the Company that it must be upon the £50 barn. The plaintiff had no right of himself to make his own selection; if his specification was a doubtful one, the fault was his own, and the law in such case cast the difficulty upon the insurer. The additional insurance did not change the original specifications, nor the receipt of the premium for a gross sum of $750 more upon the insurance already effected; each object insured was special; that upon the front barn was upon that barn alone; this in itself could make no change in the relative position of the parties or the subjects insured, or the amounts on each of the two barns as originally taken. I can therefore come to no other conclusion than that the judgment ought to be reversed.

BERTHELOT, J., believed that the description of the property sustained the plaintiff's pretensions, and that the judgment was correct.

MONK, J.,—I was much puzzled at first as to which policy applied to the barn burnt, but at last on turning to the evidence of the Secretary, Mr. Letourneau, I found that on the day of the fire, plaintiff went to the office; the policy was produced, an examination took place, and plaintiff told Letourneau that the barn in the rear was insured for £50. Letourneau made no protest, and there the matter rested. About three days afterwards, the plaintiff returned to the office and said he wished to increase the insurance on the front barn from £25 to £100. The Secretary received the application and the premium was paid on the spot. No one would contend that the Company would not have been liable for this amount if the barn had been burnt the next day It was not till some days afterwards, when some of their members went to examine the property that the difficulty was raised for the first time. The action is well founded, and the judgment must be confirmed

Judgment confirmed.

JOSLYN *v.* BAXTER.

The action was brought on a guarantee given by the defendant.

HELD—*That there was no consideration for the guarantee, and that fraud had been practiced by the plaintiff.*

BADGLEY, J.—This case from the Superior Court, St. Francis, is of considerable importance, because it involves the decision of a new point. The action is based upon a written guarantee of the defendant, Baxter, to the plaintiff, to pay what was owing to plaintiff by one Chamberlin, a man who is now dead. The defendant, Baxter, a merchant in Vermont, was joined in business there by Chamberlin, the firm being Baxter & Chamberlin. This firm became insolvent, or, at all events, embarrassed, and in order to carry on their business they united themselves with two or three other persons, under the name of Cox, Robins & Co. The creditors of Baxter & Chamberlin pressed them for a settlement of their affairs, and obliged them to make an assignment of their estate. Baxter & Chamberlin then separated, and each carried on a separate business. During the time of this separate business, Chamberlin borrowed money from the plaintiff, and led

an irregular and intemperate life, till his death in 1865. Baxter, on the other hand, established himself in business on his own account, and took a strong interest in realizing the assets of the estate of Baxter & Chamberlin, and from his own means paid large sums of money for the benefit of the estate. It was evident that Chamberlin never assisted to pay any of the co-partnership engagements, and it was also evident that Baxter had never derived benefit from the funds of the partnership, nor held any of the property of his partner Chamberlin. The plaintiff in 1856, long after the limitation period for the notes had expired, being the holder of Chamberlin's individual liabilities by his three notes made in 1846, 1847 and 1848, at Barnston, in Lower Canada, obtained from Chamberlin, then in a dying condition, an acknowledgment of the amount of these notes, and also obtained a guarantee from the defendant, dated 30th Sept., by which it was agreed that all sums due to Joslyn by Chamberlin should be paid. The action was upon this guarantee of the defendant, which it was alleged in the declaration, had been entered into by him for valid consideration given by Chamberlin. The consideration, therefore, on the face of the declaration was a consideration passing from Chamberlin to the defendant. The plea sets up that the true date of the document was the 20th September; that the law of Vermont recognizes the Statute of Limitations, and the Statute of Frauds is part of its municipal law; third, that the guarantee by the defendant was a foreign contract made in Vermont, subject to the Statute of Frauds. Fourth, that the promissory notes in question were subject to the Statute of Limitations of that State, and the time had run out; in other words they were prescribed, and payment could not have been enforced against Chamberlin, either in Vermont or in this country under our own Statute; and further denying that any consideration had been given. As to the alteration of date, the document itself showed that the date had been tampered with, and that 20th had been altered to 30th, consequently making it appear that the guarantee was given on the 30th Sept. Otherwise it would be of no use to plaintiff, for if the legal date was the 20th, there was then no debt in existence to guarantee; but if the date was the 30th, there would then be the new debt on the part of Chamberlin. Now, the Statute of Limitations does not touch the contract; it only prevents proceedings at law to enforce it; the statute goes *ad ordinationem litis non ad decisionem contractus*. This point only comes up incidentally. The main ground of objection rests upon the want of consideration for the guarantee. It was stated by defendant that there was no consideration, that it was a foreign contract requiring consideration and that the *lex loci contractus* governed, consequently the law of Vermont. A great deal of professional evidence of this has been adduced. Mr. Redfield, a distinguished lawyer of Vermont, and others, have given the Court at Sherbrooke the benefit of their professional experience. The professional evidence of record has established the absolute necessity that there should be consideration for a guarantee by the law of Vermont. Much other testimony has been adduced by plaintiff, but it does not go in any manner to support the allegation of his declaration, that the guarantee was entered into for valid consideration. The rule as to consideration is that it must either be of benefit to the defendant or detriment to the plaintiff. There was no such evidence. On the contrary, it is clear beyond contradiction that the defendant received no consideration for the guarantee, and it is also quite clear that on his part the plaintiff had suffered no injury which could have been proved as a consideration. Moreover, the law requires a present consideration; a past consideration was of no use. There was nothing of the kind in this case. But there was also fraud practised by the plaintiff, for shortly before Chamberlin's death, the plaintiff stated in conversation with defendant that Chamberlin only owed him $150 or $250; that he had owed him $1,000, but had paid him almost the whole of the debt. In the face of this evidence the plaintiff is now endeavouring to enforce this guarantee, not only for the capital of the old promissory notes, but for all the interest accumulated on them. Added to all this, the acknowledgment of the notes was obtained by fraud from Chamberlin when on the verge of death. Upon the whole it is evident that there was no consideration of any kind, and that the law of Vermont, under which the guarantee was made, requires consideration. The judgment dismissing the plaintiff's action must, therefore, be confirmed.—*Judgment confirmed.*

SEYMOUR *v.* SINCENNES.

SHORT DELIVERY.—DEMURRAGE.

There was a deficiency in the delivery of oats from three barges. The barges had been delayed; and it appeared that a portion of the cargo had been improperly placed on deck.

HELD—*That under the circumstances it was doubtful whether the plaintiff could claim for short delivery; and if he had any such claim it was extinguished by the defendant's claim for demurrage.*

BADGLEY J.—This is an action brought in the Superior Court, Montreal, by the plaintiff, as the shipper of a large amount of oats in barges belonging to the defendant. The plaintiff paid the freight, but, after the money had been paid, discovered that there was a deficiency in the delivery from the barges, and he claimed the value of the oats not delivered, which he contended he would have been entitled to deduct from the freight. The facts are simply these: In June and July, 1864, the plaintiff shipped upon three barges belonging to the defendant a large quantity of oats—11,000 bushels in each. They were to weigh a certain amount, and the freight was to be paid for them at the rate of 40 lbs. to the bushel. The barges were numbered 27, 26 and 25. No. 27, the first loaded, was detained by the plaintiff two days at Laprairie for the purpose of effecting an insurance. Then she proceeded to Burlington, but there being there many barges of a similar

kind, it was impossible for her to reach the wharf to unload. Thirteen days elapsed before she unloaded. Deducting three days allowed by the custom of the trade and one for day of arrival, there was a detention of nine days. No. 26 was also detained for a shorter period; then No. 25 came in without any detention. On the delivery of the oats from these three barges No. 27 was found 25 to 30 bushels deficient; No. 26, 145 bushels; and No. 25, 256 bushels short. The defendants had an agent at Burlington, Mr. McNaughton, who saw to the delivery of the barges. He, at the same time he was receiving the grain, made frequent representations as to the delay that was occurring, and protested against it, but the difficulty was to get the barges to the wharf. The defendant in his plea set up that the deficiency was caused by the heating of the oats during the time of detention, which made them diminish in weight by loss of moisture, and that if he was responsible for the deficiency, plaintiff's claim was offset by demurrage due to defendant, because the delay was not caused by him. Now, with reference to the question of heating, on the delivery of No. 27, which was most heated, there was a deficiency of 25 or 30 bushels; in No. 26, which was less heated, the deficiency was several times greater. When No. 25 was delivered, which had not been delayed at all, and was not heated, there was a still larger deficiency. How was this to be accounted for? It is presumed the difficulty arose in this way: each of the barges had a large bin on deck, covered over by a tarpaulin. Every one knows that a tarpaulin lying on oats, and exposed to the sun in July, will attract a great deal of heat, and so it turned out, each of these bins being affected by the heat. But going beyond this, I find proof in the record that plaintiff admitted that demurrage was due; that it should have been paid; and that he had begged the defendant not to stop the delivery, and there would be no difficulty about the demurrage. Taking then, the demurrage at the rate proved, it amounts to a sufficient sum to extinguish the whole amount claimed by plaintiff for short delivery. There is proof that there was no tampering with the oats. The action was dismissed in the Court below, and this Court is of opinion that the judgment must be confirmed. But there will be an alteration in the *motifs*, because the Court below held that if there was a deficiency, it was the fault of the plaintiff, in which opinion this Court does not concur. But it concurs in the judgment in holding the plea of compensation to be established. *Judgment confirmed.*

SUPERIOR COURT—JUDGMENTS.

MONTREAL, Feb. 28th, 1866.

GAULT *v.* DONELLY, and DONELLY, Petitioner.

HELD—*That a fraudulent preference given by a debtor to one of his creditors by selling him goods as security for a debt, is not a secreting, and does not constitute sufficient ground for a capias.*

BADGLEY, J.—This case comes up upon the merits of the petition to quash the *capias*, on the ground that the allegations of the affidavit have not been established. The affidavit sets out the grounds for the arrest; that the defendant had been for some time previously insolvent; that he had been recently married, and informed deponent that his wife desired him to go to the United States. This desire on the part of his wife was of course no justification for a *capias*. She was entitled to her opinion, and so long as her desire was not carried out, it went for nothing. There were also allegations as to defendant having borrowed money without having repaid it. This was, unfortunately, often done, and of itself afforded no ground for a *capias*. The principal ground alleged was the following: That on the previous day deponent was in the store and place of business of defendant, and was informed that he had just got through stock-taking, and the estimate of value was $5,000, which figure was correct. Defendant visited the same place the following day, and found that a large part of the stock had been taken away; and deponent saw an entry in the books of two pages in length as of goods sold to one Walsh. It was further alleged that defendant had secreted these effects. It certainly had a bad look that to-day the stock should be there, and to-morrow there should be less stock upon the shelves. But the circumstances were these: On the afternoon of the day on which Gault, the deponent, first visited the premises, Walsh, who had formerly been in partnership with the defendant, and had advanced him $1,100 or $1,200, seeing that proceedings in bankruptcy were being adopted against him, went to him and proposed to take goods to cover this debt, with the security of a person who was perfectly competent to be security, that the goods should be returned in case of any trouble. Goods were then put aside to the amount of $800 or $900, which were entered in the books as sold to Walsh. The goods were not taken away that night, but were removed the next morning, and within twenty-four hours afterwards the insolvent writ was issued. Then Walsh found it necessary under the circumstances to restore the goods, and they were placed in the hands of the assignee, so that the creditors suffered no loss. The point which comes up, then, is whether under the allegation of this fraudulent sale the plaintiff would be entitled to arrest the defendant—whether the sale to Walsh, who is himself a creditor, was actually a secreting of the goods. This sale bears all the appearance of a fraudulent preference, but it has beena lready decided that a fraudulent preference is not a secreting. The word secreting conveys the meaning of concealing, hiding, putting aside in unfrequented places. Fraudulent preference, therefore, does not in any way come within the meaning of the legal term secreting. The act of secreting his effects would be a selfish act for his own advantage; while a preference given to a particular creditor is not for the debtor's own advantage, but for that of the creditor. Nothing is shown in this case by which an intention to abscond can be discovered. The *capias* being, therefore, based

merely on the preference, the petition of the defendant must be granted, and the *capias* quashed.

Capias quashed.

POITEVIN *v.* MORGAN.

The plaintiff was discharged by the defendant, his employer, on strong suspicion of dishonesty. The defendant stated his reasons for dismissing the plaintiff to the other clerks, and also to a friend of the plaintiff who requested to be informed of them.

HELD—*That the communication made to plaintiff's friend was privileged, and that the jury should have been instructed to find for the defendant, unless they believed that express malice on his part had been proved.*

BADGLEY, J.—This case having been tried before a jury, a verdict was found for plaintiff for $300. The case now comes up on motions. The plaintiff moves that judgment be entered up according to the verdict of the jury, and the defendant meets this by two motions, first, to enter up judgment in his favour notwithstanding the verdict; and, secondly, for a new trial, if the first application should not be granted. The plaintiff was a discharged clerk of Morgan & Co., large haberdashers in this city, and the action was brought against H. Morgan, one of the firm, to recover damages for verbal slander. The declaration sets out that plaintiff is an honest man, a clerk, and was never guilty of the malversation imputed to him by the defendant. That on or about the 12th of November, 1864, in relation to his conduct as merchant's clerk, in the presence of several persons, defendant said, "I took him in the act, it is not the first time that he robbed me. He did the same at Walker's. I think I will have him arrested. It is a sore thing that Poitevin should cheat me in this way. After this I trust nobody." These are the charges. Defendant meets them by alleging that plaintiff had been in his employ, and was in the habit of appropriating to himself the goods of the firm; that defendant received an intimation of this, and spoke to plaintiff about it. That plaintiff then and there openly admitted his guilt, and entreated his employer not to expose his conduct; that thereupon defendant informed plaintiff that the matter would be investigated, but the plaintiff must not remain in his service; that the words used by defendant were occasioned by plaintiff's own conduct, and were privileged, The case was submitted to a jury, who found that plaintiff had suffered damage to the extent of $300. The evidence shows that plaintiff was in the service of defendant and his brother, composing the firm of Henry Morgan & Co. They had established certain rules for the guidance of their clerks, which were, that goods purchased and not paid for, should be entered in a book, and then be placed in a box to be called for by the express. One morning defend ant was informed by one of the clerks that plaintiff was in the habit of sending out goods without entering them, and that he had done the same at Walker's, where he had previously been employed. In the course of the morning, 12th Nov., the plaintiff made up a parcel of goods addressed to one Derochers, placed it at hand under the counter, and just as the express car was receiving the last parcel from the box, the plaintiff handed this parcel to the carter. The entire transaction, it must be observed, was contrary to the rules of the establishment. The defendant then and there asked plaintiff whether he had entered the parcel, or had charged it, and for whom it was? Plaintiff told him the purchaser, and that he had not entered or noted it, and he then proceeded to note it. In order to test the honesty of the transaction, the defendant ordered one of the clerks to go immediately to Derochers, and present the invoice of the goods for payment. Derochers replied that it was a matter between him and Poitevin; that he would pay Poitevin; his manner was suspicious. A little later, towards one or two o'clock, the plaintiff having returned from his dinner at his own house, on entering defendant's store, at once commenced an altercation with the clerk, asking him why he had gone so prematurely for payment of the goods. Whilst they were speaking together, the defendant came into the shop and enquired of the matter, then said to plaintiff, in the presence of the other clerks, that he had heard rumours respecting him, and that he would not be permitted any longer to remain in his service; that if he had not seen it himself, he would not have believed it. But he had caught him in the act, and he had heard that he had done the same at Mr. Walker's. Then he said he would have the matter investigated, and he had an idea of sending him to jail. Thereupon plaintiff begged and prayed him not to do it, as it would bring disgrace upon his family. These events occurred between plaintiff and his employer in consequence of the events of the morning. But the action was brought, not so much upon that as upon what occurred afterwards. For the same afternoon, a little after the plaintiff had left the service, Mr. Morgan again came to the shop where several clerks were present, and said: Is it not a hard thing that Poitevin has robbed me in this way? One of the clerks said to him: Are you really sure it is so? Why, answered Mr. Morgan, I have heard it, and Poitevin has acknowledged it himself. Then he said to his clerks, It is a sore thing that Poitevin should cheat me in this way; after this I trust nobody. After this, don't be surprised if I do dirty things to the clerks. Defendant was speaking, it must be borne in mind, to his clerks, the fellow servants of plaintiff. It is in evidence that there was no stranger in the shop at the time, or possibly one, but he was at such a distance that he could not hear what was passing in the rear of the store. After plaintiff was dismissed from defendant's employ, Mr. Rodier, a friend of his, called upon the defendant to enquire the cause of his dismissal, and the reason why he would not be taken back. Now, it must be observed that Mr. Rodier came there as plaintiff's friend, and in his interest, to see why he should not be taken back. The rule of law is, that where a party comes and seeks an answer and obtains it, there is no publication in a communication of this kind. The statements made to this wit-

ness I consider to be in all respects privileged, and the plaintiff's counsel at the argument frankly admitted this. The case rests upon the conversation in the store. The defendant had detected the irregular conduct of the plaintiff in delivering parcels of goods to the carrier without having entered them, and having asked unsuccessfully for payment of the bill, he at once charged the plaintiff with the thing openly, and the latter was discharged the same day between two and three o'clock. The question is not whether the imputation was true or not, but whether it was justified. Mr. Walker, it appeared, had refused to certify the plaintiff's honesty; the plaintiff himself went to him to get the word "honest" added to the character written by Mr. Walker, but the latter refused because he believed him to be dishonest. Mr. Merrill, another employer, had proceeded to indict him for dishonesty. The circumstances justified strong suspicion and instant dismissal. The alleged slander was spoken immediately after the plaintiff's dismissal, and was addressed to his fellow clerks, as an explanation of defendant's, the employer's, reason for dismissing the plaintiff. There are two points to be considered: whether the communication was privileged; and whether there was malice. Defendant's remarks were addressed to his clerks, who were in the same position as the discharged clerk, and were made by the employer in the interest of himself as such employer, as well as in the interest of the clerks. If the defendant shewed that there was no malice in his remarks, it would be a bar to the action. It was a part of the moral duty of the employer to caution his servants against the act of his clerk. He was therefore in the legitimate exercise of a duty which he owed to himself as an employer, in making use of these observations to his clerks; he was privileged in the communication. Then comes in the next principle of law that express malice must be proved before the jury could take the case out of the protection of the law. The defendant seemed to be pained by the misconduct of the plaintiff. The whole case went to the jury; under all the circumstances of the case there should have been express malice proved and express malice found; and the jury should have been told that Mr. Rodier's testimony could not be admitted at all. There was nothing on the face of the record to show that the Court charged that the defendant's remarks, or any part of them, were privileged communications. The Court should have gone beyond that and told the jury that unless they found express malice there could be no verdict for the plaintiff. I do not feel myself quite at liberty to grant the first motion of defendant, but I will grant the motion for a new trial.

New trial ordered.

BEAUCHAMP *v.* CLORAN.

NEGLIGENCE—CHILDREN OF TENDER AGE.

HELD—*That a person is liable in damages for the slightest negligence in respect to a child of tender years, the want of capacity in the latter rendering extreme care and watchfulness necessary.*

BADGLEY, J.—This is an action of damages brought by the plaintiff for an injury inflicted on his child, seven years of age. It appears that defendant's bread cart ran over the leg of the child and broke it. The case involves some nice questions with reference to negligence. The accident occurred between five and six o'clock in the afternoon, when it was perfectly light. Plaintiff's two children were carrying planks from the opposite side of the street to their father's yard. As the cart approached, the child appeared to be standing waiting till the cart had passed. He had a plank in his arms, and the end of the plank projected beyond the sidewalk. As the defendant's cart passed, the wheel struck the plank and knocked the child down off the sidewalk into the street; the wheel passed over his leg and broke it. The baker had just served bread at Mrs. Moffat's, and she says she saw the wheel strike the end of the plank, which she says overlapped the sidewalk by four or five feet. There were only two other witnesses who spoke as to the facts of the case. The oldest boy of the plaintiff says that, seeing the approach of the cart, he called to the driver to stop, but that the driver took no notice of this. The driver says that he never heard the cry, and did not see anything in the street. He did not perceive anything till he heard a noise as if a plank had got between the spokes of the hinder wheel. He then turned round and found that the waggon had run over the child. The question here is a question of negligence, and in addition a question with reference to the imputation of negligence on the part of a child of that period of life, because the principle of law is that the sufferer is only bound to exercise care and prudence equal to his capacity. The plaintiff's action does not set up properly any of the circumstances of the case, except as to the fact of the injury done to the child. It is alleged that the child was sitting at his father's door. This is not true; for it is proved that he was standing on the other side of the street. But the main fact that the defendant's bread cart did the injury, is sufficiently established. Defendant pleaded that the *étourderie* of the child led him by inexperience to pass the plank between the spokes of the wheel, and the plank being pressed by the wheel, acted upon the child and caused the injury. Taking all the circumstances into account, the tender age of the child, which bound the driver to a proportionate degree of watchfulness, and to extreme circumspection, I do not consider that the defendant's driver acted with the necessary care. The tender years of the child entitled him to unusual protection; for what would be ordinary negligence with respect to a grown person, would be gross negligence towards a child. The plaintiff must have damages. The doctor's bill was $18; and there were extra expenses in nursing, &c. Altogether judgment will go for $60, with costs as of lowest appealable class, Circuit Court.—*Judgment for plaintiff.*

BONNELL *v.* MILLER *et al.*, and WOODS, T. S., and plaintiff contesting.

HELD—*That where the plaintiff has been led to contest the declaration of a garnishee, owing to its vagueness, he may discontinue the contestation without being subjected to pay costs.*

BADGLEY, J.—The plaintiff had obtained a judgment against Miller & Co., who afterwards dissolved, and Woods, one of that company, became a partner in another firm. Plaintiff being informed that he had taken a large quantity of goods from the old firm to the new one, put an attachment into the hands of the new firm. The *tiers saisi* came up and made a general declaration that gave no information at all. The consequence was that plaintiff contested the declaration, and the question came up whether on this contestation the plaintiff should have costs or not. I am of opinion that the *tiers saisi* having invited the contestation by the vagueness of his declaration, he ought not to have costs against plaintiff discontinuing that contestation.

JOHNSON *v.* WATTS, and WATTS, opposant.

Amendment of opposition after argument.

MONK, J.—There was an opposition in this case to a judgment, and after the argument on the opposition, certain receipts were found, shewing that the whole amount has been paid. The opposant now asks to be allowed to amend his opposition on payment of costs. It is urged that no amendment can be allowed after the case has been taken *en délibéré*, but as the motion is sustained by the production of documents found, the Court is of opinion that the motion must be allowed, on payment of full costs.

OBITUARY.

CHARLES RICHARD OGDEN.

The Hon. Charles Richard Ogden, for many years Attorney-General for Lower Canada, was the first who held that office after the Union of the Provinces, a member of the first Parliament of Canada, and of the first Canadian Ministry. Mr. Ogden was the son of the Hon. Isaac Ogden, a judge of the Court of King's Bench, at Montreal, one of those loyal men who, on the secession of the now United States from the Mother Country, preferred the British to the American flag, and cast their fortunes in Canada. He was born in Quebec, about the year 1790, and was called to the Bar of Lower Canada in 1812. In 1815, he was elected a member of the Assembly for Three Rivers, and continued to represent that constituency during seven successive Parliaments, until he was advised by Lord Aylmer that, in the opinion of the Colonial Office, it would be better that the public officers of the Province should exercise "a cautious abstinence" from the great political questions of the day. On this hint, Mr. Ogden, being Attorney-General, resigned his seat in the Assembly, and retired from political life, as he supposed, for ever. In 1815 he had received a silk gown from Sir Gordon Drummond, and in 1818 the Duke of Richmond had appointed him to act as Attorney-General for the district of Three Rivers. In 1823, Lord Dalhousie recommended him for the office of Solicitor-General, and His Majesty was pleased to confer that office on him, accordingly. In 1833 he was appointed Attorney-General for Lower Canada, and was re-appointed by her present Majesty on her accession. Until 1837, Mr. Ogden resided in Quebec; but in that year the breaking out of the rebellion made it his duty to proceed to Montreal, where he continued to reside until the union of the Provinces in 1841. In 1838 the Constitution of Lower Canada was suspended by the Imperial Parliament, and the special Council for the affairs of that Province was created. As Attorney-General, and a leading member of that Council, Mr. Ogden, who had declined to accept the office of Chief Justice of the District of Montreal, bore a large part in conducting the Government under Sir John Colborne, the Earl of Durham and Mr. Poulett Thomson, and in the measures necessary to bring into operation the Act for the Union of the Canadas. He officially countersigned the proclamation by which the two Provinces were made one on the 10th February, 1841, the first anniversary of Her Majesty's wedding-day. The opinions held at the Colonial Office had by this time undergone a remarkable change, and instead of being enjoined a "cautious abstinence" from politics, Mr. Ogden was informed that he was expected to take a most active part in them, to obtain a seat in the Legislative Assembly, and to form part of the Canadian Ministry; that his emoluments were to be reduced; that he would have to reside at Kingston, the new seat of Government; and he was possibly not without a presentiment that his tenure of office might depend upon the will of a parliamentary majority. These were not the terms upon which he accepted office, and he remonstrated against them; but he was told that H. M. Government held this change to be necessary to the success of the policy they had adopted, and he submitted, and was again returned by the electors of Three Rivers. He and his colleagues conducted the Government through the first session, and brought that session to a successful close, carrying many important and useful measures. The untimely death of Lord Sydenham turned the administration of the Government upon Sir Richard Jackson, the Commander of H. M. Forces, from

whom Mr. Ogden obtained leave of absence for six months, subsequently extended to a year, in order to make a voyage to Europe for the recovery of his health, which had suffered severely from the great labours to which he had been subjected. On his return he found that during his absence, he and the ministry of which he formed part, had been removed from office by Sir Charles Bagot, and that Mr. Lafontaine and his friends held the reins of the Government. He represented that he had accepted the appointment of Attorney-General when the tenure of that office was virtually during good behaviour, and claimed redress but in vain. Sir Charles sent a message to the Legislative Assembly, recommending him for a superannuation allowance of £625 per annum ; but no motion was made to refer the message to the Committee of Supply, until the day next before that fixed for the prorogation, when it was met by an amendment that it should be considered in the next session, and it was never renewed. Mr. Ogden felt that, as a public man, his connection with the Province was at an end. He retired to England, and appealed to the Imperial Government, but was told that his claim was against that of Canada. His services were acknowledged, and he was offered several colonial appointments, which he declined ; but having been called to the English Bar, he eventually accepted the Attorney-Generalship of the Isle of Man, and was afterwards appointed to the office of District Registrar at Liverpool, and held both these appointments at the time of his decease. Mr. Ogden performed his duties ably, fearlessly and impartially ; and that he fulfilled them to the satisfaction of the Sovereign and her advisers is manifest from the important offices successively conferred upon him. In the conduct of cases before the courts of criminal jurisdiction he was singularly successful, and this mainly because, while he was in earnest in enforcing the law, he never forgot that justice should be administered in mercy. On the dark and troublous days and deplorable events between 1837 and 1841, and Mr. Ogden's relations to them, it is unnecessary to comment here ; a quarter of a century has since passed away, and we may leave them to the historian ; he had a most painful duty to perform, and we believe few could or would have performed it better. Whatever differences of opinion may have existed as to the policy which he was called upon to carry out, one thing is at least beyond a doubt—in the re-adjustment of affairs after the storm was past, he exerted himself strenuously to secure just rights to all classes of her Majesty's subjects. In private life Mr. Ogden was an amiable and estimable man, of a genial and fun-loving temperament, fond of frolic, and happy at a joke. Kind and liberal to all under him or about him, and never forgetting a friend or a service rendered ; he had that power most essential to a public man, and possessed most remarkably by the greatest, of distinguishing those able to do good service, and attaching them firmly and affectionately to him. He was twice married ; first to Mary, daughter of General Coffin, by whom he leaves no children living, and secondly to Susan, eldest daughter of the late Isaac Winslow Clarke, Deputy Commissary-General, then in charge in Montreal, and a niece of the late Lord Lyndhurst. By this lady, who died before him, Mr. Ogden leaves five children, four sons and a daughter, surviving him.

CHIEF JUSTICE EDWARD BOWEN.

The Hon. Chief Justice Bowen, of the Superior Court, died at Quebec on the 12th April, 1866. We learn from Notman's sketches that the late Chief Justice was born on the first of December, 1780, at the town of Kinsale, situated on the south-west coast of Ireland. The father of the deceased was a doctor of medicine and a surgeon in H. M. forces, and died, while very young, in the West Indies, whither he had accompanied his regiment. Having completed his education in Ireland, Mr. Bowen accepted an invitation from his great-aunt, Mrs. Caldwell, the wife of Colonel the Hon. Henry Caldwell, Receiver-General of Lower Canada, then a resident of Quebec, and arrived in this country on the 12th October, 1797. In the summer of the following year he was articled to their son, Mr. John Caldwell ; but afterwards, in consequence of Mr. Caldwell retiring from the bar, he transferred his articles of indenture to the then Attorney-General, the Hon. Jonathan Sewell, and while yet a student was appointed Deputy Clerk of the Crown for Lower Canada. In May, 1803, Mr. Bowen was called to the Bar, and was the first who received a patent of precedence as King's Counsel in Lower Canada. In 1807 he married Eliza, daughter of Dr. James Davidson, Surgeon of the Royal Canadian Volunteers. Their married life continued unbroken for the long period of 52 years, Mrs. Bowen having died in 1859. The issue of this marriage was sixteen children—eight sons and eight daughters. On the preferment of Mr. Sewell, 1808, to the office of Chief Justice, Mr. Bowen became Attorney-General, without passing through the earlier degree of Solicitor-General. He sat for the two following years as

member of the Assembly for Sorel. On the 3rd May, 1812, he was appointed a judge of the King's Bench, and in 1849 he was promoted to the office of Chief Justice of the Superior Court of Lower Canada. For nearly forty years this Methusaleh of the Bench did not feel it necessary to absent himself from his duties, or even apply for the customary three months' leave of absence. Regarding his political life, we learn that he was summoned by Royal Mandamus, in 1823, to a seat in the Legislative Council of Lower Canada, and in 1837 he was appointed Speaker of that body. During the fourteen years in which he sat in the Legislative Council, we believe, he took his part in the discussions of the time ; and, from his own view of duty, he sought to influence public affairs with wisdom and patriotism. After the re-union of the Provinces, he withdrew altogether from political as well as parliamentary life, and gave his undivided attention to the duties of his judicial office. He was, it may he added, one of the members of that important court which was specially appointed for the consideration of the vexed Seigniorial Tenure question.

Adverting to his qualities as Judge, Mr. Fennings Taylor says :—"The Chief Justice has, we believe, always been regarded as a conscientious and painstaking judge, and in matters of criminal jurisprudence particularly, the professional promise which attached to him as a barrister has, we believe, been fulfilled by him on the bench."

Recalling Sentence.—At the Middlesex Sessions recently, a young man named Charles Harmsworth, was convicted of stealing a watch. The prisoner was only 21, but there was a melancholy list of previous convictions against him, showing that from the age of 16, he had no sooner been liberated after confinement under one conviction than he committed a fresh offence. We extract the following from a London newspaper report :—

The Assistant Judge sentenced Harmsworth to penal servitude for seven years. As the prisoner was being passed out of the dock he struck the prosecutor a violent blow under the left ear, which was heard throughout the court. Upon this the Assistant Judge ordered the prisoner to be brought back, and again placed in the dock, and, addressing him said : "You have had the audacity to strike the prosecutor a violent blow within the very walls of the court, when he came here to perform a public duty. I shall therefore alter your sentence, and the sentence I now pronounce upon you is that you be kept in penal servitude for ten years." Then addressing the prosecutor, he said, "As we believe you have sustained some injury, we order you to receive £1 in addition to your ordinary allowance for attendance."

Delays of Justice.—The delays and waste of time in our Montreal Circuit Court have long been bitterly complained of. It appears that in Jamaica, the delays in the petty Courts had some influence in leading to the recent insurrection. Mr. Justice Kerr, one of the Judges of the Supreme Court, being asked by the Royal Commission why the negroes did not appeal to the law for justice when their wages were kept back, gave the following explanation :—

"It is not worth their while, on account of the difficulties thrown in the way of redress by our defective management. There is the expense. The least that a suit at petty sessions costs is 7s. 6d., and it may cost a great deal more. I knew a trespass case where the costs amounted to upwards of £10. 2d. The tax upon their time. They may have 20 miles (one way only) to walk to lodge their complaint ; and the distance to attend the hearing. 3rd. The uncertainty of the result. 4th. The certainty of intolerable delay ; no more inveterate abuse clings to the administration of justice at petty sessions ; there is great difficulty in getting the court constituted at all, but once constituted, *there immediately seems to be a sort of enchantment upon it to postpone the business.*"

And then he proceeded to give actual instances within his personal cognizance. Finally, he sums up :—

"I know of nothing more standing in need of reform than the delays of the petty court ; the vexation and waste of time which they cause to the humble class of suitors are a perfect scandal. When I said that the magistracy did not possess that confidence of the lower orders which is necessary to the security of the country, I was thinking of unpaid magistracy. I have reason to believe that the stipendiaries give satisfaction."

Danger of Being Buried Alive in France.—The French law requires the burial of a deceased person to take place, at the outside, 36 hours after the decease. A petition has been laid before the Senate, pointing out that the delay was insufficient, that there were many cases of "suspended

animation;" and, to avoid the risk of being buried alive, urging some modification of the law. The representative of the Government, M. Rouland, and Viscount de la Gueronnière opposed the prayer of the petition, and it no doubt would have been consigned to the waste paper basket, but the petitioner found an unexpected supporter in the person of Cardinal Donnet, the Archbishop of Bordeaux. It seems that upwards of 40 years ago, soon after he had taken orders, he fell into a kind of trance, which, although he retained consciousness, all those about him mistook for death. The doctor regularly certified to his demise, he heard and felt the carpenters taking the measure for his coffin, he witnessed, without being able to move, his own funeral service, but luckily awoke in time. He therefore, warmly supported the prayer of the petition, which was thereupon referred to the Government, with the hope that measures would be taken to render impossible the recurrence of such fearful mistakes. There can be no doubt that a great many people are literally put to death by being interred while only in a trance. A well-known anatomist (Bruhier) specifies 181 cases of premature burial. There are several historical instances—among them that of a Spanish nobleman, who was aroused from his lethargy by the point of the knife of Andrew Vesale, as his body was on the point of being laid open; there is also the tradition of Cardinal Espinoso, who seized hold of the bistoury after a crucial incision had been effected on his stomach. But even at the present day a well-known practitioner estimates that about ten people per annum are thus consigned to their last resting place whilst full of life. If, as in the case of Cardinal Donnet, they retain consciousness, it is difficult to imagine death under a more appalling form.

Judicial Keenness.—"It is only one hour or two since I left Lewes, the work of the Assize being over, and to me it was rather a wearisome work. Yet I do not regret having had this office (that of chaplain to the Sheriff) this year, for it has given me an insight into Criminal Court practice, which I never should have had but for this occasion, for nothing else would have compelled me to sit twice for four or five days together through every case. The general result of my experience is, that although Burke says, "the whole end and aim of legislation is to get twelve men into a jury-box," yet the jury system, beautiful as it is in theory, is in itself neither good nor bad, but depends upon two things,—first, the national character; secondly, the judge; and on this last almost entirely. The Chief Justice, Sir John Jervis, was the criminal judge this time, and his charges to the jury surpassed in brilliancy, clearness, interest, and conciseness, anything I ever could have conceived. The dullest cases became interesting directly he began to speak,—the most intricate and bewildered clear. I do not think above one verdict was questionable in the whole thirty-six cases which he tried. One was a very curious one, in which a young man of large property had been fleeced by a gang of blacklegs on the turf, and at cards. Nothing could exceed the masterly way in which Sir John Jervis untwined the web with which a very clever counsel had bewildered the jury. A private note-book, with initials for names, and complicated gambling accounts, was found on one of the prisoners. No one seemed to be able to make head or tail of it. The Chief Justice looked it over, and most ingeniously explained it all to the jury. Then there was a pack of cards which had been pronounced by the London detectives to be a perfectly fair pack. They were examined in Court; every one thought them to be so, and no stress was laid upon the circumstance. However, they were handed to the Chief Justice. I saw his keen eye glance very inquiringly over them, while the evidence was going on. However, he said nothing, and quietly put them aside. When the trial was over and the charge began, he went over all the circumstances, till he got to the objects found upon the prisoners. "Gentlemen," he said, "I will engage to tell you, without looking at the faces, the name of every card upon this pack." A strong exclamation of surprise went throught the Court. The prisoners looked aghast. He then pointed out that on the backs, which were figured with wreaths and flowers in dotted lines all over, there was a small flower in the right-hand corner of each like this—*****

The number of dots in this flower was the same on all the kings, and so on, in every card through the pack. A knave would be perhaps marked thus:—******** An ace thus:—*** And so on; the difference being so slight, and the flowers on the back so many, that even if you had been told the general principle, it would have taken a considerable time to find out which was the particular flower which differed. He told me afterwards that he recollected a similar expedient in Lord DeRos's case, and therefore set to work to discover the trick. But he did it while the case was going on, which he himself had to take down in writing."—*Rev. F. W. Robertson, Brighton.*

FORESTALLING.—"There had been a loud cry against forestallers and regraters. There had been in the month of July preceding a trial upon this subject in the Court of King's Bench. Mr. Rusby, an eminent cornfactor, was indicted for having purchased in Mark Lane ninety quarters of oats, at 41s. per quarter, and sold thirty of them again on the same day and in the same market at 44s. The 'heinous charge' being fully proved, the jury brought in a verdict of guilty; upon which the Chief Justice, Lord Kenyon, thus addressed them: 'You have conferred by your verdict the greatest benefit that ever was conferred by any jury!'

The law laid down on this occasion did not altogether pass current. It was afterwards discussed in full Court, and the Judges being equally divided in opinion, the benefit of their doubts was allowed to Mr. Rusby."—*Stanhope's Life of Pitt, vol. III, p.* 251.

ENGLISH LAW REPORTS.

In the first number of the Law Journal, we published an extract from an article in *Fraser's Magazine*, referring to a scheme for the amendment of the system of law reporting in England. In pursuance of this scheme a Council of Law Reporting, of which Sir Fitzroy Kelly is chairman, has been organised, and has commenced the publication of a series of reports, which is expected to supersede the various separate and independent sets hitherto issued. The object is announced to be "the preparation, under "professional control, through the medium of "the Council, by barristers of known abil- "ity, skill and experience, acting under the "supervision of editors, of one complete set "of Reports, to be published with prompti- "tude, regularity, and at moderate cost in "the expectation that such a set of Reports "will be generally accepted by the profes- "sion as sufficient evidence of Case Law; "so that the judge in decision, the advocate "in argument, and the general practitioner "in the advice he gives to his client, may "resort to one and the same standard of "authority."

About thirty barristers are engaged in reporting for the Series, and the style of execution and printing is very superior. The reports are paged and indexed to form separate volumes for the various Courts, under the three following classes:—

1. *The Appellate Series.*—This will comprise the decisions of the House of Lords and the Privy Council, not including Indian Appeals.

2. *The Equity Series.*—This will comprise the decisions of the Lord Chancellor and the Court of Appeal, in Chancery, Lunacy, and Bankruptcy, and also those of the Master of the Rolls, and the Vice Chancellors.

3. *The Common Law Series.*—This will comprise the decisions of the Queen's Bench, Common Pleas and Exchequer, including Writs of Error, and Appeals to the Exchequer Chamber; also the decisions of the Courts of Probate, Divorce, and Matrimonial Causes; the Admiralty and Ecclesiastical; and the Court of Criminal Appeal.

It is evident that this Series, if successful, and if it be conducted with unabated vigour and ability, must prove of great utility to the profession, and make the study of case law a much easier task to the student. As many of the English decisions are of interest here we propose to notice from time to time, beginning in the present number, the leading cases and most important holdings, giving the reference to the Law Reports, so that those interested in any case may readily find it in the English Series.

Ejectment—Title by mere Possession—Devisable Interest in Land.—A person in possession of land without other title as a devisable interest, and the heir of his devisee can maintain ejectment against a person who has entered upon the land, and cannot shew title or possession in any one prior to the testator. Possession is good title against all but the rightful owner. Asher *v.* Whitlock, Q. B. 1.

Railway Company.—Breach of Contract.—A by-law of the defendants, a railway company, required each passenger to shew his ticket when required. The plaintiff took tickets for himself, his servants, and horses, by a particular train on the defendants' railway. The train was afterwards divided into two. The plaintiff travelled in the first train, taking all the tickets with him. When the second train, with the servants and horses, was about to start, the plaintiff's servants were required to produce their tickets, and on their being unable to do so, the defendants refused to carry them:—

Held, in an action by the plaintiff for not carrying his servants, that as the defendants contracted with the plaintiff, and delivered the tickets to him and not to the servants, the defendants could not, under the by-law, justify their refusal to carry. Jennings *v.* Great Northern Railway Co., Q. B. 7.

Railway Company.—By-law, validity and construction of.—Travelling without a Ticket.—By a by-law of a railway company, no passenger was to be allowed to enter or travel in a carriage without having paid his fare and obtained a ticket, which the passenger was to shew whenever required, and give up on demand before leaving the Company's premises. And any passenger not so producing or delivering up his ticket was to be required to pay the fare from the place whence the train originally started, or forfeit a sum not exceeding forty shillings—

Held, that this by-law only applied to the case of a person having and wilfully refusing to produce or give up his ticket, and not to the case of a person travelling without having paid for and obtained a ticket, with no intention to defraud the Company.

Held, also, that if the by-law extended to the latter case, it would have been illegal and void under 8 Vict. c. 20, s. 109, as repugnant to section 103, which makes a fraudulent intention the gist of the offence of travelling without having paid the fare. Dearden *v.* Townsend, Q. B. 10.

Poor—Irremoveability.—Break of Residence.—A woman having resided for sixteen years in the parish of S. was obliged, through poverty, to sell her furniture and give up her lodgings; and being destitute, she slept for one night on doorsteps in the same parish, and after that, for twenty-one successive nights, in a refuge for the houseless poor in an adjoining parish; during the day-time she wandered about, chiefly in the parish of S. She then applied to be admitted into the workhouse of S.; but being refused, she slept for two nights in the parish, and after that was received into the workhouse, and an order for her removal applied for:—

Held, that the pauper had not ceased to reside in the parish of S., and was therefore irremoveable. Queen *v.* St. Leonard, Shoreditch, Q. B., 21.

Carrier—Contract to carry partly by land and partly by sea.—When there is one entire contract to carry partly by land and partly by sea, the contract is divisible, and as to the land journey, the carrier is within the protection of the Carriers' Act, 11 Geo. 4. and 1 Wm. 4, c. 68. LeConteur *v.* London and South-Western Railway Co., 1 Q. B., 54. The remarks of the judges in this case are of interest, as showing that the Company would have been liable but for the special protection afforded by the Carriers' Act, which says "No carrier by land shall be liable to the loss or injury of certain articles above the value of £10, unless the value is declared, and the increased charge paid."

The facts were these: The passenger, a master mariner, on arriving at the station at Southampton, took his chronometer, valued at £25, in his hand, gave it to the porter of the defendants, and the porter then, in his presence, placed it upon the seat. The passenger went away for some purpose; while he was gone the chronometer was stolen. The judges were all of opinion that carriers are liable for small articles carried by passengers into the cars, unless the case comes as this did, under the special provisions of the Carriers' Act. Chief Justice Cockburn remarked: "I cannot help thinking we ought to require very special circumstances indeed, and circumstances leading irresistibly to the conclusion that the passenger takes such personal control and charge of his luggage as to altogether give up all hold upon the Company, before we can say that the Company, as common carriers, would not be liable in the event of the loss; if, therefore, the case had depended upon the question whether or not the Company were liable upon the general issue, I should be of opinion that the plaintiff was entitled to recover."

Statute of Frauds, 29 *Car.* 2, *c.* 3, *s.* 17:—*Letter to an agent sufficient memorandum.*—A letter signed by the party to be charged, written to his own agent, referring to letters of the agent stating the terms upon which the latter has made a contract on his behalf with the other party for the purchase of goods, is a sufficient note or memorandum of the bargain to satisfy the 17th section of the Statute of Frauds. Gibson *v.* Holland, C. P. 1. In this case the defendant had commissioned a person to purchase a horse for him, and, on hearing that it had been purchased, wrote to his agent, saying, "I only returned home yesterday evening, or I should have at once answered your first letter, and sent you a cheque for the mare *which you were kind enough to buy for me.*" The Court was of opinion that it was not necessary that the document should be addressed to the person who was to take advantage of it. "Provided you have in writing an admission by the party to be charged of the bargain having been made, the requirement of the statute is satisfied, though the memorandum does not shew a contract in the sense of its being a complete agreement."

Bankruptcy—Deed of Arrangement—"Value" of Creditors—Secured and unsecured Creditors—Section 192 of the English Bankruptcy Act, 1861, requires that a deed of arrangement between a debtor and his creditors shall, in order to bind non-assenting creditors, be assented to or approved of in writing by a majority in number, representing three-fourths in *value* of the creditors of such debtor, whose debts shall respectively amount to £10 and upwards:—

HELD—*That in determining whether the requisite majority in value of the creditors have assented to the deed, the value of securities held by secured creditors is not to be deducted. Whittaker v. Lowe, Ex.* 74.

CROWN CASES RESERVED.

Bigamy—Absence during seven years.—Upon a trial for bigamy, when it is proved that the prisoner and his first wife have lived apart for the seven years preceding the second marriage, it is incumbent on the prosecution to shew that during that time he was aware of her existence; and, in the absence of such proof, the prisoner is entitled to be acquitted. Queen *v.* Curgerwen, C. C. R. p. 1. In this case the prisoner had been convicted by the jury, but Willes, J., let him out on bail till the opinion of the Court for Crown Cases Reserved had been taken. Pol-

lock, C. B., who rendered the judgment of the Court quashing the conviction, observed: "This question has arisen more than once before; and we are now asked to settle the law on the subject. The term "burden of proof" is an inconvenient one, except when a person is called upon to prove an affirmative. Our attention has been called to a note by the editor of Russell on Crimes (Mr. Greaves), known as a gentleman of great learning, ability, and research, who appears to have adopted the view that the burden of proof lies on the prisoner. We think, however, that it is contrary to the general spirit of the English law that the prisoner should be called on to prove a negative; and that it is better, and more in agreement with the general doctrine and principles of our criminal law, to adopt the rule laid down by Wightman, J., in *Reg v. Heaton.* (3 Fost. & Fin. 819.)"

Attempt to have carnal knowledge of a girl under the age of ten.—Consent.—The offence of attempting to have carnal knowledge of a girl under the age of ten years may be committed, notwithstanding the girl consents to the acts done. Queen v. Beale, C. C. R., p. 10. The case stated shewed that the girl "was nearly ten years old; that she lived with her father and mother; and that the prisoner was a lodger in their house. On the day in question she went into his room, when he pulled her between his knees, raised her clothes, took down his trowsers, and indecently assaulted her. He hurt her a little; on which she cried out. But she did nothing to prevent him, and made no objection to the act. He told her not to tell her mother, and she did not in fact tell of it until some days after." The jury found the prisoner "*Guilty*, for that the child was too young to know what it was she was doing, and therefore consented to the act done by the prisoner." Pollock, C. B., in giving judgment affirming the conviction, observed: "The learned judge who tried the case seems to have thought that a full and ample consent on the part of the girl would have prevented the completion of the crime, and that a consent of a different character would not have had that effect. That opinion, in reality, was utterly unfounded. Consent was altogether unimportant. The jury said the prisoner was guilty, but found that there had been a qualified consent on the part of the girl; and, if the nature of the consent had been material, it might have been necessary to analyze the facts of the case. Those facts, however, shew an attempt to commit a crime, where consent was immaterial. Of course, if the indictment had been merely for an indecent assault, the question of consent would have become material."

Malicious Injury.—The prisoner plugged up the feed-pipe of a steam-engine, and displaced other parts of the engine in such a way as rendered it temporarily useless, and would have caused an explosion, if the obstruction had not been discovered, and, with some labour, removed:—

HELD—*That he was guilty of damaging the engine with intent to render it useless, within the meaning of the 24 and 25 Vict. c. 97, s. 15, which enacts that, "Whosoever shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any machine or engine, whether fixed or moveable, used or intended to be used for sowing, reaping, &c., shall be guilty of felony." Queen v. Fisher C. C. R., p. 7. Pollock, C. B., observed: "It is like the case of spiking a gun, where there is no actual damage done to the gun, although it is rendered useless. The case falls within the expression "damage with intent to render useless."*

The conviction was affirmed.

A PURE JUDICIARY.—In a forcible speech at the Cooper Institute, New York, in 1863, Mr. Brady, an eminent lawyer of that city, made use of the following language:—"Why, gentlemen, let me tell you, as one who began the profession of law at twenty-one years of age, such a change has occurred in the administration of justice in this city that when a man walks into my office with a bundle of papers, and says to me, 'Mr. Brady, here is an injunction granted to prevent my carrying on my regular business,' and, in one of the very latest cases I tried, there was an injunction to prevent a man from continuing to act as the foreman and cutter in a merchant tailoring establishment in this city—an injunction from a judge to prevent him from carrying on his lawful trade for the maintenance of his family. How do you think I received those papers? When I first entered the profession, I would never have asked what judge granted it, but I would have looked to the merits of the case, and tried to tell my client what I thought. But, gentlemen, the question, before even looking at one word written on that paper, was, 'What judge granted this injunction?' Next, 'What judge is to hear this case?' And when that latter question is answered, in many cases I have handed the papers back and told my friend, 'I can be of no service to you—you must employ such a man, between whom and the judge, or judge's partner, friend, agent, or huckster, there exists a great affection—employ him and you will have some chance to maintain your rights in a court of justice.' Is this any fancy picture? It is the language of the most sober and dreadful reality."

THE JURY SYSTEM.—On the 13th April instant, Mr. Justice Mondelet called attention to the anomalous state of the Jury Law, by which the first panel of jurors were allowed to go at the end of one week, while the second panel must do their duty for the rest of the term. The latter had been here now for about a fortnight, and there was every prospect of their being here for a considerably longer period. It was a great hardship, and ought to be rectified by the Government amending the Jury Law.

Mr. Ramsay said that he had drawn the attention of the Government to the subject.

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